DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1211
Title: Panagis Vartelas, Petitioner
v.
Eric H. Holder, Jr., Attorney General
Docketed: April 6, 2011
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (09-0649-ag)
Decision Date: September 9, 2010
Rehearing Denied: January 4, 2011
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Apr 4 2011	Petition for a writ of certiorari filed. (Response due May 6, 2011)
Apr 26 2011	Order extending time to file response to petition to and including June 6, 2011.
Jun 1 2011	Order further extending time to file response to petition to and including July 6, 2011.
Jun 30 2011	Order further extending time to file response to petition to and including August 5, 2011.
Aug 5 2011	Brief of respondent Eric H. Holder, Jr., Attorney General in opposition filed.
Aug 17 2011	DISTRIBUTED for Conference of September 26, 2011.
Aug 19 2011	Reply of petitioner Panagis Vartelas filed. (Distributed)
Sep 27 2011	Petition GRANTED.
Oct 21 2011	Motion to dispense with printing the joint appendix filed by petitioner Panagis Vartelas.
Oct 28 2011	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Nov 1 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including November 15, 2011.
Nov 1 2011	The time to file respondent's brief on the merits is extended to and including December 16, 2011.
Nov 1 2011	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioner.
Nov 14 2011	SET FOR ARGUMENT ON Wednesday, January 18, 2012.
Nov 15 2011	Brief of petitioner Panagis Vartelas filed.
Nov 18 2011	CIRCULATED.
Nov 22 2011	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. (Distributed)
Nov 22 2011	Brief amicus curiae of The National Immigrant Justice Center filed. (Distributed)
Nov 22 2011	Brief amici curiae of Asian American Justice Center, et al. filed. (Distributed)
Nov 22 2011	Brief amicus curiae of The American Immigration Lawyers Association filed. (Distributed)

Dec 5 2011	Record received from U.S.C.A. for 2nd Circuit. (1 box)
Dec 16 2011	Brief of respondent Eric H. Holder, Jr., Attorney General filed. (Distributed)
Dec 30 2011	Reply of petitioner Panagis Vartelas filed. (Distributed)
Jan 18 2012	Argued. For petitioner: Stephanos Bibas, Philadelphia, Pa. For respondent: Eric D. Miller, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Mar 28 2012	Judgment REVERSED and case REMANDED. Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, Sotomayor, and Kagan, JJ., joined. Scalia, J., filed a dissenting opinion, in which Thomas and Alito, JJ., joined.
Apr 30 2012	JUDGMENT ISSUED.
May 2 2012	Record returned to U.S.C.A. for Second Circuit.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. _____

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OFFICE OF THE CLERK

In The

Supreme Court of the United States

PANAGIS VARTELAS,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 110 Stat. 3009 (1996), April 1, 1997, 8 U.S.C. § 1101(a)(13), provided:

> The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary.

In *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), this Court held that a lawful permanent resident ("LPR") who made an "innocent, casual, and brief" trip across an international border did not "intend" a "departure" within the meaning of 8 U.S.C. § 1101(a)(13).

However, effective April 1, 1997, 8 U.S.C. § 1101(a)(13)(C)(v) repealed 8 U.S.C. § 1101(a)(13). The amended 8 U.S.C. § 1101(a)(13)(C)(v) provides:

> (C) An alien lawfully admitted for permanent residence in the United States shall not

QUESTION PRESENTED – Continued

> be regarded as seeking an admission into the United States for the purpose of the immigration laws unless the alien, (v) has *committed* an offense identified in section 212(a)(2), unless since offense the alien has been granted relief under section 212(h) or 240A(a). (Emphasis added)

Two other Circuit Courts of Appeals have held that the amended 8 U.S.C. § 1101(a)(13)(C)(v) cannot be retroactively applied to an alien who pled guilty to a crime involving moral turpitude prior to the effective date of IIRIRA.

The question presented is:

Should 8 U.S.C. § 1101(a)(13)(C)(v), which removes LPR of his right, under *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), to make "innocent, casual, and brief" trips abroad without fear that he will be denied reentry, be applied retroactively to a guilty plea taken prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 110 Stat. 3009 (1996)?

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The opinion of the United States Court of Appeals for the Second Circuit is reported at 620 F.3d 108 (2d Cir. 2010) and is reproduced in the Appendix.

The Board of Immigration Appeals decision, dated January 23, 2009, denying the motion to reopen is reproduced in the Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit denying the petition for review was filed on September 9, 2010. The Second Circuit entered an order denying the petitioner's motion for panel rehearing and hearing *en banc* on January 4, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1101(a)(13)(C)(v)

> (C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for the purpose of the immigration laws unless the alien, (v) has committed an offense identified in section 212(a)(2), unless since offense the alien has been granted relief under section 212(h) or 240A(a).

The repealed 8 U.S.C. § 1101(a)(13)

The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary.

8 U.S.C. § 1182(a)(2)(A)(i)(I)

(i) In general. – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts constitutes the essential elements of –

(I) A crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, . . . is inadmissible.

STATEMENT OF FACTS

A. Agency Proceedings

To state the facts briefly, the petitioner is a native and citizen of Greece, born on November 1, 1961. The petitioner became a Lawful Permanent Resident ("LPR") of the United States on January 5, 1989. Upon returning from Greece to JFK airport in New York on January 29, 2003, he was found inadmissible. The petitioner had been out of the U.S. for merely *one week* for family business.

On March 27, 2003, the petitioner was issued a Notice to Appear ("NTA") before the Immigration Court in New York. The NTA charged him as inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I), *for having been convicted of a crime involving moral turpitude.* The petitioner pled guilty to and was convicted of Conspiracy to Make or Possess a Counterfeit Security in the United States District Court, Southern District of New York, on December 9, 1994. He was sentenced to a term of four months in prison and two years of probation.

The petitioner appeared before an immigration judge. His first counsel submitted a motion to terminate but failed to file a brief as requested by the immigration judge. The petitioner's second attorney, instead of pursuing the motion to terminate, filed an application for a waiver under the former 8 U.S.C. § 1182(c) which was denied by the immigration judge on June 27, 2006, and Petitioner was ordered

removed to Greece. A timely appeal to the Board of Immigration Appeals ("BIA") was dismissed.

The petitioner, through new counsel, subsequently filed a motion to reopen with the BIA based on ineffective assistance of counsel insofar as he failed, *inter alia,* to raise the critical issue of the retroactivity of 8 U.S.C. § 1101(a)(13)(C)(v). The BIA denied the motion on January 23, 2009. A copy of the decision is reproduced in the Appendix. On the issue of retroactivity of 8 U.S.C. § 1101(a)(13)(C)(v), the BIA refused to follow the new counsel's reliance on *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007), because the instant case arises in the jurisdiction of the Second Circuit Court of Appeals, not the Ninth Circuit, citing *Matter of Anselmo*, 20 I&N Dec. 25, 31-34 (BIA 1989).

B. The Proceedings in the U.S. Court of Appeals for the Second Circuit

A timely Petition for Review was filed with the U.S. Court of Appeals for the Second Circuit. The Second Circuit panel heard the oral argument on January 12, 2010, and an opinion was issued on September 9, 2010, denying the Petition for Review, a copy of which is reproduced in the Appendix.

The gravamen of the Second Circuit panel's ruling with respect to the issue of retroactivity of 8 U.S.C. § 1101(a)(13)(C)(v) is that the dispositive act to assess the retroactivity of 8 U.S.C. § 1101(a)(13)(C)(v) is the LPR's decision to commit an offense, rather than the LPR's decision to plead guilty to or admit to

the commission of an offense. The Second Circuit panel rejected the petitioner's argument that the application of the new 8 U.S.C. § 1101(a)(13)(C)(v) would interfere with his settled expectations of a guilty plea. 620 F.3d at 118. The Second Circuit panel asserts that "[w]e have consistently rejected the notion that an alien can reasonably have relied on provisions of the immigration laws in 'committing' his crimes." *Id.* at 120.

The petitioner timely filed a motion for panel rehearing and hearing *en banc* which was denied by the U.S. Second Circuit Court of Appeals and an order was entered on January 4, 2011. A copy of the Order is reproduced in the Appendix.

REASONS FOR GRANTING THE PETITION

The decision of the Second Circuit explicitly created a circuit split with two other circuits in a context – immigration law – where nation-wide uniformity is particularly important. *See Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1876) ("The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco."). The decision below also conflicts with the retroactivity analysis established by this Court in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), which guarantees that an individual's due process rights (or, in this case, thousands of LPRs

due process rights) are not infringed by the retroactive application of a newly-enacted law. The Second Circuit's decision is fundamentally wrong as a matter of statutory interpretation.

More importantly, if the Second Circuit panel's interpretation of 8 U.S.C. § 1101(a)(13)(C)(v) stands, it would run counter to the plain language of 8 U.S.C. § 1182(a)(2) and adversely affect thousands of LPRs who are deemed to have *committed* but were *not convicted* nor *admitted to* an offense identified in 8 U.S.C. § 1182(a)(2) prior to April 1, 1997, upon return from innocent, casual and brief trips abroad. For all of these reasons, the petition should be granted.

A. The Petition Should Be Granted Because the Second Circuit Panel Decision Creates a Split With Two Sister Circuits

The Second Circuit panel decision in this case conflicts with the decisions of two other circuits and creates a circuit split regarding the relevant facts and the applicable sections of the immigration act. Indeed, the Second Circuit panel acknowledged that "two of our sister circuits have reached a conclusion contrary to the one we reach today." 620 F.3d 108 at 120 (citing *Camins v. Gonzales*, 500 F.3d 872; *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004)). However, the Second Circuit panel did not attempt to harmonize its decision with these cases, which are

identical in the relevant facts and in the question of law presented, simply rejecting the circuit courts' reasoning as unpersuasive.

Both Mr. Camins and Mr. Olatunji were found inadmissible for having been convicted of (not having committed) a crime involving moral turpitude under 8 U.S.C. § 1182(a)(2)(A)(i)(I) as the petitioner herein.

The U.S. Court of Appeals for the Ninth Circuit held that the repealed 8 U.S.C. § 1101(a)(13) may not be applied retroactively to LPRs who acted in reasonable reliance on the repealed 8 U.S.C. § 1101(a)(13) prior to IIRIRA's effective date. *Camins v. Gonzales*, 500 F.3d 872, 885 (9th Cir. 2007). The *Camins* court followed and joined the Fourth Circuit's decision in *Olatunji v. Ashcroft,* 387 F.3d 383 (4th Cir. 2004).[1]

However, the Second Circuit panel erroneously refused to follow the *Camins* and *Olatunji* courts' correct retroactivity analysis based on the conviction of a crime involving moral turpitude and misconstrued the significance of 8 U.S.C. § 1101(a)(13)(C)(v)'s reference to the term "commission" of an offense and interpreted it without reading it in conjunction with 8 U.S.C. § 1182(a)(2)(A)(i)(I).

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[1] The *Olatunji* court went further and found that "reliance, in any form, is irrelevant to the retroactivity inquiry" and held that IIRIRA's change in the *Rosenberg v. Fleuti* doctrine could not be retroactively applied to a person who pled guilty prior to its enactment. 387 F.3d 383, 388-96.

B. The Petition Should Be Granted Because the Second Circuit Panel Fundamentally Misinterpreted the Relevant Statutory Language

The Second Circuit panel egregiously erred by focusing its retroactivity analysis solely on the term "committed" without referring to it in conjunction with the "[as] identified in section 212(a)(2) [8 U.S.C. § 1182(a)(2)]" provision of 8 U.S.C. § 1101(a)(13)(C)(v). The Secord Circuit panel fundamentally failed to recognize that 8 U.S.C. § 1101(a)(13)(C)(v) only attaches consequences to *convictions* or *formal admissions* of a crime involving moral turpitude, and not to the mere commission of an offense identified in 8 U.S.C. § 1182(a)(2). If the court below's interpretation is permitted to stand, it would lead to an absurd result as LPRs would be inadmissible to the United States without being convicted or admitting to a crime involving moral turpitude. This is patently illogical and contrary to the letter and spirit of the statute in question.

Effective April 1, 1997, 8 U.S.C. § 1101(a)(13)(C)(v) was enacted, which states in relevant part:

> (C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for the purpose of the immigration laws unless the alien, . . . (v) has committed an offense identified in section 212(a)(2) of this title. . . .

However, section 212(a)(2) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(2), in turn, states in relevant part that an "alien is inadmissible if he or she has been *convicted* of, or *admits having committed*, or *admits committing* acts which constitute the essential elements of – a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime. . . ." (Emphasis added).

The Second Circuit panel flagrantly misinterpreted the term "committed" in 8 U.S.C. § 1101(a)(13)(C)(v) without discerning its meaning in conjunction with 8 U.S.C. § 1182(a)(2) which sets forth the criteria for inadmissibility based on criminal and related grounds. The relevant statutory provision involved in this petition relates to a crime involving moral turpitude which is governed by 8 U.S.C. § 1182(a)(2)(A)(i)(I) which unambiguously renders an alien inadmissible upon conviction of or admission to committing acts of a crime involving moral turpitude.

This Court has long ruled that whether "a particular application is retroactive will depen[d] upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Republic National Bank of Miami v. United States*, 506 U.S. 80, 100 (1992). The determinative event of this petition is the petitioner's *conviction* of a crime involving moral turpitude which rendered him inadmissible.

For that reason the Second Circuit panel misconstrued the meaning of 8 U.S.C. § 1101(a)(13)(C)(v)'s reference to the "commission" of an offense by failing to consider its interaction with other provisions of the INA. The Second Circuit panel grossly misconstrued that "Section 101(a)(13)(C)(v) governs the entry status of a LPR who has 'committed' a [crime of moral turpitude]. . . ." 620 F.3d at 120. It should be noted that 8 U.S.C. § 1101(a)(13) is a definitional section defining the terms "admission" and "admitted" used in numerous places throughout the INA. Subsections (B) and (C) represent provisos about when and whether certain classes of aliens should be exempt from application of other provisions of the Act that use the terms "admission" or "admitted," as subsection (C) says, "for purposes of the immigration laws."

By the explicit terms of 8 U.S.C. § 1182(a)(2)(A)(i), an LPR is not and cannot be found inadmissible upon merely *commission* of a crime involving moral turpitude – an LPR is only inadmissible if he has *admitted* or been *convicted* of a crime involving moral turpitude. This section of the statute provides that an LPR may only be deemed to be seeking an admission if he has "committed" an offense "identified in" § 1182(a)(2) – this entire section of the statute only comes into play if the LPR is actually inadmissible for a conviction of or admission of a crime involving moral turpitude. The very language relied on by the Second Circuit panel is rendered statutory surplusage if "identified in" is interpreted as disjunctive from the ground for admissibility under 8 U.S.C. § 1182(a)(2).

In reviewing statutes a legislature is presumed not to use any superfluous language, *Bailey v. U.S.*, 516 U.S. 137, 145 (1995). *See also Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990), where the Court held that "[o]ur cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."

Here, it is the petitioner's conviction based on his guilty plea is the determinative event that triggered the issue of inadmissibility. The Second Circuit panel erred when it held that "section [i.e. § 1101(a)(13)(C)(v)] does not hinge on either a LPR's conviction or his decision to plead guilty." 620 F.3d at 119. In fact, it does hinge on the plea and conviction because in the absence of a conviction or admission of a crime involving moral turpitude, 8 U.S.C. § 1101(a)(13)(C)(v) simply does not apply.

Because the structure of the statute is so unambiguous the Second Circuit panel blatantly erred when it faulted the *Olatunji* and *Camins* courts for failing to address the significance of the term "committed." 620 F.3d at 121. The *Camins* and *Olatunji* courts did not address the commission because only a conviction or admission of a crime involving moral turpitude makes 8 U.S.C. § 1101(a)(13)(C)(v) relevant to the LPR's right to be readmitted to the United States. The *Camins* and *Olatunji* courts properly focused on the guilty pleas (convictions) because it was those subsequent events that made 8 U.S.C. § 1101(a)(13)(C)(v) relevant.

In addition, aside from being convicted, the commission of a crime involving moral turpitude has no legal consequence unless it is admitted by an alien. The Second Circuit panel fatally failed to recognize that the mere commission of a crime is insufficient to sustain a charge of inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(I) as hereinabove discussed. The commission of an identified offense must be admitted by an alien. The admission must comply with the long standing BIA case law governing charges of inadmissibility. The BIA has held that, for an alien to be charged with inadmissibility due to admitting the essential elements of a crime involving moral turpitude the following must occur: (1) the admitted conduct must constitute the essential elements of the crime; (2) the applicant must have been provided with the definition and the elements of the offense prior to his admission; and (3) the admission must be voluntary. *Matter of K-*, 7 I&N Dec. 594, 598 (BIA 1957). *See also Matter of J-*, 2 I&N Dec. 285 (BIA 1945), *Matter of L-*, 2 I&N Dec. 486 (BIA 1946), *Matter of E-N-*, 7 I&N Dec. 153 (1956). *See also* 22 C.F.R. § 40.21(a)(1). The record of proceedings herein, however, is devoid of any reference to admission of a crime involving moral turpitude.

These are the precise statutory reasons that the petitioner herein as well as the petitioners in *Camins* and *Olatunj* were charged for having been convicted of and not for having committed a crime of moral turpitude under 8 U.S.C. § 1182(a)(2)(A)(i)(I).

C. The Petition Should Be Granted to Correct the Second Circuit Panel's Misapplication of *Landgraf* to 8 U.S.C. § 1101(a)(13)(C)(v).

Because the LPR was, thus, not an alien seeking "entry" to the United States upon his return, he was not subject to a ground of inadmissibility. The Second Circuit panel has held that amendments to 8 U.S.C. § 1101(a)(13)(C)(v), post-dating the petitioner's plea, effectively eliminated the *Fleuti* doctrine.

However, it has long been held that the retroactive application of statutes is disfavored in the absence of clear and contrary Congressional intent. As elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly, settled expectations should not be lightly disrupted. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265.

This Court in *Landgraf* articulated a two-step test for determining whether a federal statute applies retroactively. First, "absent clear congressional intent favoring" retroactive application, the court must move to the second step of the *Landgraf* test. The first step is not an issue. Under the second step, this Court determines whether "the new provision attaches new legal consequences to events completed before its enactment" such that it interferes with "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 270.

In determining whether the attachment of new legal consequences to past actions conflicts with "familiar considerations of fair notice, reasonable reliance, and settled expectations," *Landgraf*, 511 U.S. at 270, the petitioner must demonstrate that the new law was impermissibly applied to his case retroactively and, in fact, he detrimentally relied on the prior law at the time of the guilty plea. The petitioner in the instant case has definitely met this burden insofar as the repealed 8 U.S.C. § 1101(a)(13), as interpreted by this Court allowed the petitioner to take innocent, casual, and brief trips outside the United States without subjecting himself to a charge of inadmissibility.

The Second Circuit panel insisted on focusing on the term "committed an offense" and erroneously held that retroactive application of 8 U.S.C. § 1101(a)(13)(C)(v) was proper under *Landgraf* and noted that it "would border on the absurd to suggest that Vartelas committed his counterfeiting crime in reliance on the immigration laws." 620 F.3d at 120.

Therefore, the Second Circuit panel fundamentally erred in refusing to recognize that the amended 8 U.S.C. § 1101(a)(13) does in fact attach a new legal consequence to the petitioner's guilty plea based on his conviction which renders him inadmissible upon return from travel outside the United States, no matter how innocent, casual, and brief the trip. The petitioner reasonably and detrimentally relied on the

existing law at the time he pled guilty to the offense. And, as this Court has recognized, "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *See Landgraf,* 511 U.S. at 265 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

Further, this Court states "[a] statute has an impermissible retroactive effect when it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or consideration already past." *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal citation omitted).

Consequently, the Second Circuit panel's decision runs afoul of the second step of the *Landgraf* test and the reasoning of *St. Cyr* which particularly warrant review by this Court insofar as the constitutional presumption against retroactive legislation is "deeply rooted in our nation's jurisprudence and embodies a legal doctrine centuries older than our Republic." *Landgraf,* 511 U.S. at 265.

In sum, the Court should adopt the holding by the *Camins* court which agreed with the Fourth Circuit, that limitation on the ability to travel outside the United States is one of the "immigration consequences" of which LPR defendants considering whether to enter into a plea agreement would be acutely aware, and that "aliens who accepted a plea agreement prior to IIRIRA could reasonably have

relied on their continuing ability to take brief trips abroad." *Olatunji*, 387 F.3d at 397. The common, functional judgment will conclude that 8 U.S.C. § 1101(a)(13)(C)(v) would have an impermissible retroactive effect if applied to the petitioner's pre-IIRIRA guilty plea for the reasons stated herein.

The question of appropriate application of *Landgraf* retroactivity analysis is raised by two pending certiorari petitions *Johnson v. Holder* filed on December 1, 2010 and *Judulang v. Holder* filed on November 24, 2010, further confirming the nationwide importance of the issue presented in this petition.

CONCLUSION

For the foregoing reasons, the Court should grant the instant petition for a writ of certiorari and reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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620 F.3d 108

United States Court of Appeals,
Second Circuit.
Panagis VARTELAS, Petitioner,
v.
Eric H. HOLDER, Jr., U.S. Attorney General,
Respondent.

Docket No. 09-0649-ag.
Argued: Jan. 12, 2010.
Decided: Sept. 9, 2010.

Andrew K. Chow, New York, New York (Neil A. Weinrib & Associates, New York, New York, on the brief), for Petitioner.

Keith I. McManus, Senior Litigation Counsel, Washington, D.C. (Tony West, Assistant Attorney General, Terri J. Scadron, Assistant Director, Anthony W. Norwood, Senior Litigation Counsel, Office of Immigration Litigation, U.S. Department of Justice, Civil Division, Washington, D.C., on the brief), for Respondent.

Before: KEARSE, CABRANES, and LIVINGSTON, Circuit Judges.

KEARSE, Circuit Judge:

Petitioner Panagis Vartelas, an alien who is a lawful permanent resident of the United States and who traveled abroad after being convicted of a crime involving moral turpitude, seeks review of a decision of the Board of Immigration Appeals ("BIA" or the "Board") denying his motion to reopen a removal

proceeding brought against him pursuant to § 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act ("INA" or the "Act"), 8 U.S.C. § 1182(a)(2)(A)(i)(I), as a returning alien seeking "admission" to the United States within the meaning of INA § 101(a)(13), 8 U.S.C. § 1101(a)(13), as amended by § 301(a)(13) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub L. No. 104-208, Div. C., 110 Stat. 3009-546 (1996). Vartelas moved to reopen on the ground that his attorneys had rendered ineffective assistance by failing to move before the Immigration Judge ("IJ") for termination of the removal proceeding on the grounds (a) that the offense of which he was convicted was within the scope of 8 U.S.C. § 1182(a)(2)(A)(ii)(II) and thus was not a removable offense, and (b) that the IIRIRA amendment should not be applied retroactively to treat him as seeking "admission." In his petition for review, Vartelas contends principally that the BIA applied an erroneous legal standard to his ineffective assistance claim and erred in concluding that he was not prejudiced by his attorneys' failure to move for termination of the removal proceeding on the above grounds. Finding no merit in his contentions, we deny the petition for review.

I. BACKGROUND

Vartelas, a citizen of Greece, has been a lawful permanent resident ("LPR") of the United States since 1989. In 1994, he was convicted, upon his plea of guilty, of having conspired in 1992 to make or

possess a counterfeit security in violation of 18 U.S.C. § 371, *see id.* § 513(a). That offense carried a maximum term of imprisonment of five years. The range of imprisonment recommended by the Sentencing Guidelines ("Guidelines") was 4-10 months; the prison term imposed on Vartelas was four months.

The INA provides generally that "[a]ny alien who at the time of entry" would be ineligible for admission into the United States under "the law existing at such time" by reason of, *inter alia,* having committed a non-petty offense involving moral turpitude "is deportable." 8 U.S.C. § 1227(a)(1)(A) (2006) ("Any alien who at the time of entry . . . was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable."), *transferred from id.* § 1251(a)(1)(A) (1994) ("Any alien who at the time of entry . . . was within one or more of the classes of aliens excludable by the law existing at such time is deportable."); *see id.* § 1182(a)(2)(A) (classes ineligible for admission include aliens who have been convicted of, or who admit having committed, non-political, non-petty crimes involving moral turpitude, or conspiracy to commit such crimes); *see also* 18 U.S.C. § 1(3) (1982 & Supp. IV 1987) (repealed 1987) (terming a misdemeanor for which an individual could not be imprisoned for more than six months or fined more than $5,000, or both, "a petty offense"). Crimes involving moral turpitude include counterfeiting offenses. *See, e.g., United States ex rel. Volpe v. Smith, Director of Immigration*, 289 U.S. 422, 423, 53 S.Ct. 665, 77 L.Ed. 1298 (1933).

On January 29, 2003, Vartelas returned to the United States from a trip to Greece and claimed the right to return as an LPR. He was questioned by an immigration officer about his 1994 conviction, and in March 2003 he was served with a notice to appear for removal proceedings on the ground that he was inadmissible as an alien who sought entry into the United States after being convicted of, or having admitted committing, a crime of moral turpitude.

A. *The Proceedings Before the IJ and the Appeal to the BIA*

In 2003, 2004, and early 2005, Vartelas appeared before an IJ at a number of preliminary hearings at which various possible defenses to the charge of removability were discussed. At a hearing on June 15, 2005, however, Vartelas's then-attorney informed the IJ that Vartelas was conceding that he was removable as charged, but that he would request relief from removal under former § 212(c) of the INA, 8 U.S.C. § 1182(c) (1994) (repealed 1997). Although that section, which granted the Attorney General discretion to waive certain grounds of deportability for a subset of LPRs, had been repealed by IIRIRA, it remained available to LPRs whose convictions were based on guilty pleas entered before IIRIRA's effective date of April 1, 1997, *see INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) ("*St. Cyr II*"), *aff'g* 229 F.3d 406 (2d Cir.2000) ("*St. Cyr I*"). After Vartelas's first attorney thereafter neglected his responsibilities, Vartelas changed attorneys and

continued the strategy of conceding his removability and requesting a § 212(c) discretionary waiver of removal.

In an Oral Decision delivered on June 27, 2006, the IJ denied Vartelas's application for relief under § 212(c). She noted, *inter alia,* that Vartelas had made frequent trips to Greece and remained there for long periods of time; had not paid his United States income taxes; had not shown hardship to himself, his estranged wife, or his United States citizen children who resided in Chicago with their mother; and had not shown that he supported the children. The IJ concluded that the equities did not warrant discretionary relief, and she ordered Vartelas removed from the United States to Greece.

Vartelas appealed the IJ's decision to the BIA, arguing (1) that although he had committed a crime involving moral turpitude, he had been sentenced to a prison term of less than six months and that under 8 U.S.C. § 1182(a)(2)(A)(ii)(II) his crime was thus not a removable offense; and (2) that, if removable, he should have been granted relief under § 212(c). In an opinion dated May 1, 2008, the Board affirmed the order of removal. It refused to consider Vartelas's contention that his conspiracy crime was not a removable offense, because Vartelas had conceded removability before the IJ. The Board rejected Vartelas's contention that he should have been granted § 212(c) relief, adopting and affirming the decision of the IJ. The Board noted that Vartelas had not taken advantage of the opportunity afforded him by the IJ

to clarify the facts relevant to his tax problems, and it stated that the positive equities of Vartelas's family ties and long residence in the United States were offset by his frequent sojourns in Greece and his voluntarily maintaining his United States residence in New York, a great distance from his children.

B. *The Motion To Reopen the Proceeding*

In July 2008, represented by new counsel, Vartelas filed a timely motion before the BIA to reopen, citing *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A.1988) (setting standard for motions to reopen based on claims of ineffective assistance of counsel), and alleging that the series of attorneys who represented him in the proceedings before the IJ had failed to provide him with effective assistance. In addition to arguing that his first attorney had been ill-prepared and had missed certain hearings, Vartelas argued principally that he had been severely prejudiced by both attorneys' failure to pursue his defenses to removability. Adverting to the defense the Board had refused to consider on his appeal, and citing a predecessor of § 1182(a)(2)(A)(ii)(II), Vartelas pointed out that "the sentence actually imposed did not exceed a term of imprisonment in excess of six months" and stated that he "was not relying on 212(c) relief when he entered his plea of guilty; he was relying on the fact that the sentence imposed made his crime a non-removable crime at the time of conviction." (Vartelas Motion To Reopen and Remand at 12-13.) In addition, Vartelas argued that IIRIRA had changed the

meaning of "entry" in § 101(a)(13) with respect to LPRs and that his prior attorneys had provided ineffective assistance by not challenging removability on the ground that the IIRIRA change should not be applied to him retroactively.

In an opinion dated January 23, 2009 ("BIA 2009 Decision") (reported, without pagination, at 2009 WL 331200), the BIA denied Vartelas's motion to reopen. The Board evaluated Vartelas's ineffective-assistance claim under the standard that had recently been announced by the Attorney General in *In re Compean, Bangaly & J-E-C-*, 24 I. & N. Dec. 710 (A.G. Jan. 7, 2009) ("*Compean I*") (overruling *Lozada* in part), *vacated by In re Compean, Bangaly & J-E-C-*, 25 I. & N. Dec. 1 (A.G. June 3, 2009) ("*Compean II*"). Describing the then-controlling *Compean I*, the Board noted that

> [t]o prevail on a deficient performance of counsel claim, the respondent must establish that his lawyer's failings were egregious and that his case was prejudiced by counsel's performance. To establish prejudice, the respondent must show that but for the lawyer's failing [s], he likely would have succeeded on the merits of his underlying claim to remain in the United States.

BIA 2009 Decision at 1. The Board concluded that Vartelas did not meet this standard. It found no deficiency in the performance of Vartelas's second attorney; and it found that even if there were derelictions on the part of his first attorney, Vartelas

> failed to show that [the attorney's] performance prejudiced his case. The Immigration Judge gave the respondent additional time to obtain new counsel. [Vartelas] has failed to establish that he is not inadmissible as charged. [Vartelas] is not eligible for the "petty offense" exception under section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II), because the maximum penalty for the crime of which he was convicted is five years imprisonment. . . .

BIA 2009 Decision at 2. The Board also rejected the contention that the IIRIRA-amended version of INA § 101(a)(13) was impermissibly retroactive as applied to Vartelas, noting that Vartelas cited only *Camins v. Gonzales*, 500 F.3d 872 (9th Cir.2007). It stated that his reliance on that case was "misplaced because the instant case arises in the jurisdiction of the United States Court of Appeals for the Second Circuit, not the Ninth Circuit," and "the Board historically follows a court's precedent in cases arising in th[e] circuit" in which the proceeding is conducted. BIA 2009 Decision at 2. The Board concluded that Vartelas's attorneys' failure to raise the retroactivity argument thus did not prejudice him.

II. DISCUSSION

On this petition for review, Vartelas argues principally that the BIA, in considering his motion to reopen the removal proceeding, should have applied

the *Lozada* standard to his ineffective-assistance-of-counsel claim and should have found that standard satisfied. He contends that the BIA, in concluding that he failed to satisfy the prejudice prong of his claim, erred in not concluding that his offense of conviction was a nonremovable offense under § 1182(a)(2)(A)(ii)(II), *see* Part II.B. below; and in applying the IIRIRA-amended § 101(a)(13), rather than applying the "*Fleuti* doctrine," *see Rosenberg v. Fleuti*, 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963) ("Fleuti"), to conclude that in returning to the United States he was not seeking "entry," *see* Part II.C. below.

In reviewing the BIA's denial of a motion to reopen, we apply an abuse-of-discretion standard. *See, e.g., Debeatham v. Holder*, 602 F.3d 481, 484 (2d Cir.2010); *Wang v. BIA*, 437 F.3d 270, 273 (2d Cir.2006). For the reasons that follow, we see no abuse of discretion here.

A. *The Prejudice Prong of a Claim of Ineffective Assistance in Removal Proceedings*

In 1988, the BIA in *Lozada* established a framework within which it would consider a motion to reopen a removal proceeding based on a claim of ineffective assistance of counsel. *See generally* 19 I. & N. Dec. at 637. With regard to the substance of such a claim, the Board stated as follows:

> Any right a respondent in deportation proceedings may have to counsel is grounded in

> the fifth amendment guarantee of due process. . . . Ineffective assistance of counsel in a deportation proceeding is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case. . . . *One must show, moreover, that he was prejudiced by his representative's performance.*

Id. at 638 (emphasis added).

In applying *Lozada* principles in the context of an alien's claim that his attorney failed to make certain arguments, the BIA has articulated a variety of standards as to what the alien must show to establish that counsel's performance caused him prejudice. For example, in *In Re Fernandez*, No. A41 590 875, 2006 WL 3088698 (B.I.A. Sept. 21, 2006) (unpaginated), the Board stated that "prejudice" "means that *it is likely that an alien would have prevailed* at the hearing or on appeal had the negligent representation not occurred." (Emphasis added.) In *In Re Munroe*, No. A34 111 687, 2007 WL 275812 (B.I.A. Jan. 18, 2007) (unpaginated), the Board described a standard considerably less stringent than likely-to-have-prevailed, stating that "evidence of prejudice" is

> evidence reflecting a *reasonable* ***possibility*** that the outcome of his removal hearing would have been different had counsel not declined to apply for relief on his behalf or conceded the charge of removability.

(Emphasis added.) And in applying *Lozada* in *In Re Chambers*, No. A18 133 311, 2007 WL 2588591

(B.I.A. Aug. 8, 2007) (unpaginated), the Board referred to yet another standard, stating that "[p]rejudice is shown where counsel's actions [are] so inadequate that there is a *reasonable* ***probability*** that, but for counsel's ineffectiveness, the outcome of the proceedings would have been different," while also stating that Chambers had failed to show prejudice because he "failed to demonstrate what actions his former attorney should have taken *that* ***would*** *have warranted a different result.*" (Emphases added.)

In *Compean I*, the then-Attorney General vacated *Lozada* in part, renouncing its assumption of a constitutional foundation for the right to counsel in removal proceedings, and established a clear and stringent standard for BIA analysis of motions to reopen based on claims of ineffective assistance of counsel. The *Compean I* Attorney General opined that "the Constitution does not confer a constitutional right to effective assistance of counsel in removal proceedings." 24 I. & N. Dec. at 714; *but see, e.g.*, *Debeatham v. Holder*, 602 F.3d at 485 (such claims are grounded in the right to due process). The Attorney General noted, however, that the alien has a statutory privilege to retain counsel, *see Compean I*, 24 I. & N. Dec. at 726, and concluded that the Board has discretion to reopen proceedings "[i]n extraordinary cases, where a lawyer's deficient performance *likely changed the outcome of an alien's removal proceedings*," *id.* at 714 (emphasis added). He stated, "I conclude that to establish prejudice arising from a lawyer's deficient performance sufficient to permit

reopening, an alien must show that but for the deficient performance, it is *more likely than not* that the alien would have been entitled to the ultimate relief he was seeking." *Id.* at 733-34 (emphasis added); *see also id.* at 734 (finding "the 'more likely than not' standard . . . more appropriate than [the] 'reasonable probability' standard" and "more demanding").

In *Compean II*, a new Attorney General "vacate[d] *Compean [I]* in its entirety," 25 I. & N. Dec. at 3, and called for rulemaking to evaluate the *Lozada* framework and to determine what modifications should be proposed, *see id.* at 2. With *Compean I* vacated, the *Lozada* standard was expressly restored. *See, e.g., id.* at 3 ("To ensure that there is an established framework in place pending the issuance of a final rule, the Board and Immigration Judges should apply the pre-*Compean* standards to all pending and future motions to reopen based upon ineffective assistance of counsel, regardless of when such motions were filed.").

Compean I was announced after Vartelas filed his motion to reopen but before the Board ruled on the motion; *Compean II* vacated *Compean I*, but not until after the Board had ruled on his motion. Thus, the *Compean I* standard was the prevailing standard at the time of the Board's decision. Vartelas contends that the Board's application of the "stringent requirement" set in *Compean I*, rather than the standard set by *Lozada*, denied him due process. (Vartelas brief on appeal at 12.)

We conclude, however, that in this case we need not determine which of the standards of prejudice applies to an ineffective-assistance-of-counsel claim in removal proceedings. Whatever the provenance of the right, an ineffective-assistance claim cannot be established without some showing of prejudice; and for the reasons stated in the sections that follow, Vartelas has failed to show prejudice under any standard.

B. *The Petty Offense Exception*

Vartelas contends that his crime involving moral turpitude was a nonremovable offense under § 1182(a)(2)(A)(ii)(II) because he was sentenced to a prison term of less than six months. We reject this contention because it disregards one of the criteria stated in that section.

Section 212(a)(2) of the INA, 8 U.S.C. § 1182(a)(2), defines classes of aliens who are excludable on "[c]riminal and related grounds." In 1992 and 1994, when Vartelas committed and pleaded guilty to, respectively, the crime of conspiracy to make or possess a counterfeit security, subsection (a)(2)(A) provided, in pertinent part, as follows:

> **(i) In general**
>
> Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime,
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> * * *
>
> is excludable.
>
> **(ii) Exception**
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> *Clause (i)(I) shall not apply to an alien who committed only one crime if –*
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> * * *
>
> (II) *the maximum penalty possible for the crime of which the alien was convicted* (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) *did not exceed imprisonment for one year* ***and,*** if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

8 U.S.C. § 1182(a)(2)(A) (1988 & Supp. III 1992) (emphases added); *see* 8 U.S.C. § 1182(a)(2)(A) (2006) (substituting "inadmissible" for "excludable"). By its terms, therefore, § 1182(a)(2)(A)(ii)(II) is not applicable unless, *inter alia,* both the prison term actually imposed was not more than six months and "the maximum" prison term "*possible* for the crime" (emphasis added) was not more than one year.

The section of the Criminal Code under which Vartelas was convicted authorizes, *inter alia*, "imprison[ment of] not more than five years," 18 U.S.C. § 371. Thus, following his plea of guilty, Vartelas could have been sentenced to five years' imprisonment. His reliance on the fact that the range of imprisonment recommended by the Guidelines for his offense was 4-10 months (*see* Vartelas brief on appeal at 19) is misplaced. The plain meaning of "*maximum* penalty *possible*" (emphases added) is the highest penalty that the applicable statute allows. The "maximum . . . possible" does not refer to a Guidelines-recommended range of imprisonment that is less than what a court could lawfully impose. *Accord Mejia-Rodriguez v. Holder*, 558 F.3d 46, 48 (1st Cir.2009) ("'maximum penalty possible' is determined in reference to the relevant statutory range of imprisonment and not the federal Sentencing Guidelines range"); *Mendez-Mendez v. Mukasey*, 525 F.3d 828, 833 (9th Cir.2008) ("The plain language of the statute indicates that the phrase, 'the maximum penalty possible,' refers to the statutory maximum, not the maximum sentence under the sentencing guidelines.").

As the crime of which Vartelas was convicted carried a statutory maximum prison term of five years, that crime was not one for which he could not lawfully be imprisoned for more than one year, and it thus did not qualify as a petty offense within the scope of § 1182(a)(2)(A)(ii)(II). Accordingly Vartelas was not prejudiced by his attorneys' failure to argue that he was nonremovable under that section.

C. The Retroactivity Argument

As indicated in Part I above, § 1227(a)(1)(A) provides that an alien who is inadmissible under the laws in effect at the time of his entry into the United States is deportable. Prior to the enactment of IIRIRA, the INA defined "entry" to

> *mean [] any coming of an alien into the United States,* from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, *except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if* the alien proves to the satisfaction of the Attorney General that *his departure to a foreign port or place* or to an outlying possession *was not intended* or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary.

8 U.S.C. § 1101(a)(13) (1994) (emphases added).

In 1963, the Supreme Court in *Fleuti* interpreted this provision as it applied to an LPR who had been served with a notice of deportation under INA § 212(a) after returning to the United States following a visit of "about a couple hours" to Mexico, 374 U.S. at 450, 83 S.Ct. 1804 (internal quotation marks omitted). The Court noted that "Congress unquestionably has the power to exclude all classes of undesirable aliens from this country," *id.* at 461, 83 S.Ct. 1804, but concluded that Congress had not meant its definition of "entry"

to encompass a resident alien's return from a brief, innocent, casual foreign excursion that was not intended to disrupt his resident alien status, *see id.* at 462, 83 S.Ct. 1804. The Court concluded that such a trip "therefore may not subject [the LPR] to the consequences of an 'entry' into the country on his return." *Id.*

Effective April 1, 1997, the INA was amended by IIRIRA to, *inter alia,* delete the above definition of "entry" from the statute; and § 101(a)(13) was divided into subsections, the most pertinent of which provide as follows:

> (A) The terms *"admission" and "admitted" mean,* with respect to an alien, the lawful *entry* of the alien into the United States *after inspection and authorization by an immigration officer.*
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> * * *
>
> (C) *An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission* into the United States for purposes of the immigration laws *unless* the alien –
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> * * *
>
> (v) *has committed an offense identified in section 1182(a)(2)* of this title. . . .

8 U.S.C. §§ 1101(a)(13)(A) and (C)(v) (2006) (emphases added). The word "entry" is not defined; and the

new § 101(a)(13) omits reference to any effect that an LPR may have "intended" his foreign sojourn to have.

The statute itself is silent as to the intended effect of these amendments on the *Fleuti* doctrine, and this Court has not previously addressed this question. The BIA, however, has interpreted IIRIRA's amendment of § 101(a)(13) as superseding the *Fleuti* doctrine. In *In re Collado-Munoz*, 21 I. & N. Dec. 1061 (B.I.A.1998), noting that "the central basis for the Supreme Court's reasoning in" *Fleuti* was the then-existing § 101(a)(13)'s definition of "entry" and its reference to "intended" consequences, and that "the amended section 101(a)(13)(C) of the Act no longer defines the term 'entry' and no longer contains the term 'intended,'" 21 I. & N. Dec. at 1065, the BIA concluded that "the *Fleuti* doctrine, with its origins in the no longer existent definition of 'entry' in the Act, does not survive the enactment of the IIRIRA as a judicial doctrine," *id.* The BIA reasoned that under the plain language of the new § 101(a)(13)(C)(v), which contains "a congressional directive not contained in the previous version of that section and not before the Supreme Court when it decided *Fleuti*," 21 I. & N. Dec. at 1066,

> *a lawful permanent resident who has committed an offense identified in section 212(a)(2)*, who has not since such time been granted relief under [certain other provisions], *who departs the United States and returns, shall be regarded as seeking an admission*

> *into the United States despite his lawful permanent resident status,*

21 I. & N. Dec. at 1064 (emphases added), and is to be so viewed

> without regard to whether [his] departure from the United States might previously have been regarded as "brief, casual, and innocent" under the *Fleuti* doctrine,

id. at 1066.

As we have noted in dealing with a different IIRIRA amendment,

> [i]n general, when Congress has delegated authority to an agency to administer a statute, and "the statute is silent or ambiguous with respect to [a] specific issue," we must accord substantial deference to a reasonable interpretation given by the agency and cannot "simply impose [our] own construction on the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The BIA, through powers delegated by the Attorney General, enforces and interprets the INA and thus has the authority to fill statutory gaps with reasonable interpretations.

Martinez v. INS, 523 F.3d 365, 372 (2d Cir.2008) ("*Martinez*") (other internal quotation marks omitted), *cert. denied*, ___ U.S. ___, 129 S.Ct. 1314, 173 L.Ed.2d 584 (2009). In the present case, given IIRIRA's deletion of the pre-1997 definition of "entry," its emphasis

on "admission," and its specification of the conditions under which an LPR is or is not to be regarded as seeking "admission," we conclude that the BIA in *Collado-Munoz* reasonably interpreted IIRIRA as superseding the *Fleuti* doctrine. *Accord De Vega v. Gonzales*, 503 F.3d 45, 48 (1st Cir.2007); *Camins v. Gonzales*, 500 F.3d at 880; *Malagon de Fuentes v. Gonzales*, 462 F.3d 498, 501-02 (5th Cir.2006); *Tineo v. Ashcroft*, 350 F.3d 382, 395-96 (3d Cir.2003).

Vartelas argues, however, that because his plea of guilty preceded IIRIRA, the IIRIRA amendment to § 101(a)(13) was impermissibly retroactive as applied to him. We consider the issue of retroactivity *de novo*, without giving deference to the opinion of the BIA, as the question of whether an IIRIRA amendment "would have an improper retroactive effect in [a] particular case . . . does not concern the sort of statutory gap that Congress has designated the BIA to fill, nor a matter in which the BIA has particular expertise." *Martinez*, 523 F.3d at 372-73. In conducting the retroactivity analysis, we use the familiar two-step inquiry announced in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

In the first *Landgraf* step, we "must ascertain, using the ordinary tools of statutory construction, 'whether Congress has expressly prescribed the statute's proper reach.'" *Martinez*, 523 F.3d at 370 (quoting *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483). If Congress has expressly prescribed the relevant provision's temporal reach, we need look no farther. Here, we note – and the government concedes – that

Congress has not expressly prescribed the temporal reach of § 101(a)(13). Accordingly, we move to the second *Landgraf* step, in which we ask whether application of the new section would have a "genuinely 'retroactive' effect," 511 U.S. at 277, 114 S.Ct. 1483, that is, "whether the new provision attaches new legal consequences to events completed before its enactment" and inappropriately, *i.e.*, contrary to "familiar considerations of fair notice," upsets "settled expectations" that were based on "reasonable reliance," *id.* at 270, 114 S.Ct. 1483. In making this determination, we bear in mind that a "'statute [is not impermissibly retroactive] merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law,'" *Martinez*, 523 F.3d at 370 (quoting *Landgraf*, 511 U.S. at 269, 114 S.Ct. 1483) (brackets in *Martinez*), for "[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever," *Landgraf*, 511 U.S. at 269 n. 24, 114 S.Ct. 1483 (internal quotation marks omitted).

Vartelas contends that the application of the new § 101(a)(13)(C)(v) to him would indeed interfere with his settled expectations because that section

> *attach[es] a new legal consequence to Petitioner's guilty plea* because, based on Petitioner's conviction, [it] renders him inadmissib[l]e upon return from travel outside the United States, no matter how innocent, casual, and

> brief the travel. Petitioner reasonably relied on the *Fleuti* doctrine *when taking the plea and his subsequent decision to depart the U.S.* for a brief period of time.

(Vartelas brief on appeal at 16 (emphases added)). This contention might have greater merit if § 101(a)(13)(C)(v) depended on an LPR's decision to plead guilty. In *St. Cyr II*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347, the Supreme Court addressed the amendments to the INA adopted in § 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and IIRIRA, which, respectively, reduced and then eliminated the availability to LPRs of discretionary relief from deportation under INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1997). Affirming this Court's decision in *St. Cyr I*, 229 F.3d at 416, 420, the Supreme Court held that those amendments "impose [d] an impermissible retroactive effect on aliens who, in reliance on the possibility of § 212(c) relief, *pleaded guilty* to aggravated felonies," *St. Cyr II*, 533 U.S. at 315, 121 S.Ct. 2271 (emphasis added). The Supreme Court observed that "in the period between 1989 and 1995 alone, § 212(c) relief was granted to over 10,000 aliens," 533 U.S. at 296, 121 S.Ct. 2271, constituting "a substantial percentage" of all LPR "applications for § 212(c) relief," 533 U.S. at 296, 121 S.Ct. 2271; *see id.* at 296 n. 5, 121 S.Ct. 2271 (noting "statistics indicating that 51.5% of the applications for which a final decision was reached between 1989 and 1995 were granted"). The *St. Cyr II* Court noted that

> [g]iven the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants *deciding whether to accept a plea offer* or instead to proceed to trial.

Id. at 323, 121 S.Ct. 2271 (footnote omitted) (emphasis added). Elementary notions of fairness thus required the conclusion that the AEDPA/IIRIRA amendments eliminating the availability of § 212(c) relief would be impermissibly retroactive if applied to LPRs who, prior to the effective dates of those statutes, relied on the availability of such relief in deciding to plead guilty:

> Plea agreements involve a *quid pro quo* between a criminal defendant and the government. . . . In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources. . . . *There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.*

St. Cyr II, 533 U.S. at 321-22, 121 S.Ct. 2271 (internal quotation marks and footnote omitted) (emphasis added).

> [*After*] *prosecutors have received the benefit of these plea agreements,* agreements that were likely facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, *it would surely be contrary to "familiar considerations of fair notice, reasonable reliance, and settled expectations,"* . . . to hold that IIRIRA's subsequent restrictions deprive them of any possibility of such relief.

Id. at 323-24, 121 S.Ct. 2271 (quoting *Landgraf*, 511 U.S. at 270, 114 S.Ct. 1483) (emphases ours).

In *St. Cyr I*, we noted that it was "the conviction, not the underlying criminal act, that trigger[ed] the disqualification from § 212(c) relief," 229 F.3d at 418 (internal quotation marks omitted); and in *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir.), *cert. denied*, 540 U.S. 910, 124 S.Ct. 287, 157 L.Ed.2d 199 (2003), we noted that the retroactivity concerns with respect to § 212(c) relief are triggered by an LPR's decision to plead guilty, rather than by a conviction after a trial. Although Vartelas argues that § 101(a)(13)(C)(v) is impermissibly retroactive because he pleaded guilty in reliance on the *Fleuti* doctrine, that section, unlike § 212(c), does not hinge on either an LPR's conviction or his decision to plead guilty; rather, it turns on whether the LPR "has *committed* an offense identified in section 1182(a)(2)" (emphasis added). In defining the terms used in the INA, Congress has fashioned some subsections in reference to an alien's conviction, and others in reference to the offense's commission. For example, *compare* 8 U.S.C. § 1101(f)(8)

(stating that no person is to be "regarded as . . . a person of good moral character" during any period in which he "has been *convicted* " of an aggravated felony (emphasis added)), *with id.* § 1101(a)(13)(C)(v) (prescribing the admission status of an LPR who "has *committed* an offense" involving moral turpitude (emphasis added)). When Congress "uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n. 9, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (internal quotation marks omitted). Here, we infer that in framing § 101(a)(13)(C)(v) to refer to an LPR who "has committed an offense," Congress intended the focus to be on the alien's commission of the crime; and that is the event on which we focus in order to determine whether the new section unfairly unsettles any reasonable expectations.

We have consistently rejected the notion that an alien can reasonably have relied on provisions of the immigration laws in "committ[ing]" his crimes. In *St. Cyr I*, we rejected the petitioner's argument – and the district court's ruling – that the AEDPA/IIRIRA elimination of § 212(c) discretionary relief "should not be applied retrospectively to bar [an LPR's] eligibility for § 212(c) relief because . . . *his criminal conduct* . . . occurred prior to the statutes' enactment," *St. Cyr I*, 229 F.3d at 409 (emphasis added). The district court had "reasoned that Congress did not intend AEDPA § 440(d) to be applied retroactively to such pre-enactment events because it would unfairly attach new

legal consequences to *pre-AEDPA criminal conduct.*" *Id.* (emphasis added). We refused to endorse the proposition that "barring eligibility for discretionary relief on the basis of *pre-enactment criminal conduct* – as opposed to a plea going to the guilt of a deportable crime – constitutes an impermissible retroactive application of a statute," *id.* at 418 (emphasis added). Rather, we viewed it as

> border[ing] on the absurd to argue that these aliens might have decided not to commit [their] crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation.

Id. (internal quotation marks omitted). *See, e.g., Domond v. INS*, 244 F.3d 81, 86 (2d Cir.2001) (same).

We made a similar observation in *Martinez*, 523 F.3d 365, which concerned the former § 212(c)'s requirement that, to be eligible for discretionary relief from deportation, the alien must, *inter alia,* have been domiciled in the United States for seven consecutive years; the *Martinez* petitioner, who committed his crime in 1995, made a retroactivity challenge to IIRIRA § 240A(d)(1)(B), codified at 8 U.S.C. § 1229b(d)(1)(B), which provides that the continuity of an LPR's residence in the United States is halted by his commission of a crime involving moral turpitude or narcotics trafficking. We rejected the notion that an alien in committing a crime could reasonably

have relied on the prospect that there would be no change in the immigration laws, noting that "it makes no sense at all to ask whether an alien . . . acted with an intention to preserve [his or her] eligibility for relief under § 212(c)" in "committing" his offense. 523 F.3d at 376 (internal quotation marks omitted).

In the present case, given that § 101(a)(13)(C)(v) governs the entry status of an LPR who has "committed" a crime involving moral turpitude, we likewise conclude that the application of that section with respect to Vartelas's January 2003 foreign trip – an event begun and completed long after the effective date of IIRIRA – is not impermissibly retroactive, for here too it would border on the absurd to suggest that Vartelas committed his counterfeiting crime in reliance on the immigration laws.

Vartelas points out that two of our Sister Circuits have reached a conclusion contrary to the one we reach today, *see Camins v. Gonzales*, 500 F.3d 872; *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir.2004). We do not find these cases persuasive. The *Camins* Court reasoned that § 101(a)(13)(C)(v) unfairly imposes a new burden on an LPR who pleaded guilty to a crime involving moral turpitude by "effectively prohibit[ing] him from making any overseas travel." 500 F.3d at 883 (emphasis omitted). The burden, however, is not on the LPR's right to travel abroad but rather on the absoluteness of his right to enter the United States again – a matter that is squarely within the province of Congress to regulate. Moreover, in both *Camins* and *Olatunji*, the Courts analyzed retroactivity in relation to the alien's plea of guilty; neither opinion

addressed § 101(a)(13)(C)(v)'s focus on the LPR's "commi[ssion]" of the crime, or on the lack of rationality in any claim that the LPR reasonably relied on the immigration laws in deciding to break the criminal laws. Indeed, the *Olatunji* Court held that reliance plays no role whatever in the retroactivity analysis, *see* 387 F.3d at 389-91, a proposition that is contrary to the reasoning of this Court in *St. Cyr I*, *see* 229 F.3d at 419, and to that of the Supreme Court in *St. Cyr II*, *see, e.g.*, 533 U.S. at 325, 121 S.Ct. 2271 ("the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect" "*[b]ecause respondent, and other aliens like him, almost certainly relied* upon th[e] likelihood [of such relief] in deciding whether to forgo their right to a trial" (emphasis added)).

In sum, we conclude that § 101(a)(13)(C)(v), introduced by IIRIRA, has superseded the *Fleuti* doctrine and that the application of that section to an LPR who, after the effective date of IIRIRA, makes a trip abroad and seeks to reenter the United States is not impermissibly retroactive. Thus, Vartelas has not shown that he was prejudiced by his attorneys' failure to argue retroactivity.

CONCLUSION

We have considered all of Vartelas's contentions in his petition for review and have found them to be without merit. The petition for review is denied.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A022 670 589 –
New York, NY

Date: JAN 23 2009

In re: PANAGIS VARTELAS

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Nicole Hartnett, Esquire

ON BEHALF OF DHS: Ricardo Vega
Assistant Chief Counsel

APPLICATION: Reopening

This case was last before us on May 1, 2008, when we affirmed the Immigration Judge's June 27, 2006, decision denying the respondent's application for a waiver of inadmissibility pursuant to former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c).

On July 30, 2008, the respondent, a native and citizen of Greece, filed a timely motion to reopen these proceedings based on a claim of ineffective assistance of counsel. The respondent presents claims against two former attorneys. He alleges that Mr. Sarikas, who represented him before the Immigration Judge from October 28, 2003, until March 10, 2006, failed to submit a brief in support of the motion to

terminate, failed to challenge the charge of inadmissibility alleged in the Notice to Appear, and failed to properly prepare the respondent's 212(c) waiver application. *See* Respondent's Motion at 9-15, Attachment B. The respondent alleges that Mr. Massel failed to withdraw the respondent's pleading entered by and through Mr. Sarikas.

Subsequent to the filing of this motion the Attorney General issued *Matter of Compean, Bangaly & J-E-C-*, 24 I&N Dec. 710 (A.G. 2009) (*overruling in part Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), and *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003)), a decision which significantly changes our approach for addressing such claims. This type of claim, now referred to as a "deficient performance of counsel" claim, may be asserted by a respondent where his prior attorney's deficient performance likely changed the outcome of the removal proceeding. To prevail on a deficient performance of counsel claim, the respondent must establish that his lawyer's failings were egregious and that his case was prejudiced by counsel's performance. To establish prejudice, the respondent must show that but for the lawyer's failing, he likely would have succeeded on the merits of his underlying claim to remain in the United States. If discretionary relief was involved, as in this case, the respondent must also present the evidence he believes would have led to a favorable exercise of discretion.

We will address the respondent's claim against each attorney in turn. First, we consider whether

Mr. Sarikas's performance was deficient and, if so, whether his deficiencies prejudiced the respondent's case. At the respondent's June 15, 2005, removal proceeding, Mr. Sarikas was expected to make legal arguments regarding the motion to terminate filed on December 23, 2004 (Tr. at 14). However, instead of arguing that proceedings be terminated, Mr. Sarikas conceded the respondent's removability and indicated that he would apply for a 212(c) waiver (Tr. at 16-17). At the respondent's March 10, 2006, removal hearing, the Immigration Judge acknowledged that Mr. Sarikas had been derelict in his duty to the respondent and continued the proceedings so that the respondent could obtain new counsel (Tr. at 21-22, 25).

Even if Mr. Sarikas was derelict in his duty, the respondent has failed to show that his performance prejudiced his case. The Immigration Judge gave the respondent additional time to obtain new counsel. The respondent has failed to establish that he is not inadmissible as charged. The respondent is not eligible for the "petty offense" exception under section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II), because the maximum penalty for the crime of which he was convicted is five years imprisonment (Exh. 4.C at 7). The respondent's reliance on *Camins v. Gonzales,* 500 F.3d 872 (9th Cir. 2007) (holding that the new version of section 101(a)(13) of the Act could not be applied retroactively to aliens like the respondent who pled guilty to crimes before its enactment), is misplaced because the instant case arises in the jurisdiction of the

United States Court of Appeals for the Second Circuit, not the Ninth Circuit. *See Matter of Anselmo,* 20 I&N Dec. 25, 31-32 (BIA 1989) (the Board historically follows a court's precedent in cases arising in that circuit). Additionally, *Camins* was decided two years *after* the respondent conceded his inadmissibility before the Immigration Judge.

Next, we consider the respondent's allegations against Mr. Massel. For the reasons stated above, we find no error on Mr. Massel's part for failing to withdraw the respondent's pleading. We also reject the respondent's allegation that Mr. Massel failed to properly advise the respondent regarding his duty to file annual tax returns. *See* Respondent's Motion, Attachments B and C. Mr. Massel challenges the respondent's allegations of misconduct. *See* Respondent's Motion, Attachment C. He explains that he advised the respondent to file the taxes and that the respondent did not ask when he would be require to pay the taxes. Finally, the respondent, who is seeking discretionary relief, has not presented the evidence he believes would have led to a favorable exercise of discretion.

Based on the foregoing, the respondent's motion to reopen is denied.

ORDER: The motion to reopen is denied.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of January, two thousand eleven,

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Panagis Vartelas,
Petitioner,
v.
Eric H. Holder, Jr.,
U.S. Attorney General,
Respondent.

ORDER
Docket Number:
09-0649-ag
(Filed Jan. 4, 2011)

Petitioner Panagis Vartelas filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

OPPOSITION BRIEF

No. 10-1211

In the Supreme Court of the United States

PANAGIS VARTELAS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In 1996, Congress amended 8 U.S.C. 1101(a)(13) to specify that those aliens seeking "admission" to the United States include lawful permanent resident aliens who are returning to the United States from travel abroad and who "ha[ve] committed an offense identified in [8 U.S.C.] 1182(a)(2)." 8 U.S.C. 1101(a)(13)(C)(v). The question presented is as follows:

Whether the definition of "admission" in 8 U.S.C. 1101(a)(13)(C), as amended in 1996, is applicable to a lawful permanent resident alien who committed an offense identified in 8 U.S.C. 1182(a)(2) (and was convicted of that offense upon a guilty plea) before 1996 and then, in 2003, departed from and returned to the United States.

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In the Supreme Court of the United States

No. 10-1211

PANAGIS VARTELAS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 620 F.3d 108. The decision of the Board of Immigration Appeals (Pet. App. 29-32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2010. A petition for rehearing was denied on January 4, 2011 (Pet. App. 33). The petition for a writ of certiorari was filed on April 4, 2011. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, defines several classes of aliens who are inadmissible to the United States, including certain criminal aliens. See generally 8 U.S.C. 1182(a)(2) (2006

& Supp. III 2009). As relevant here, that class includes "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of * * * a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime." 8 U.S.C. 1182(a)(2)(A)(i)(I). As also relevant here, this Court has held that counterfeiting offenses are plainly crimes involving moral turpitude. See *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 423 (1933).

Until 1996, the INA defined an "entry" into the United States as "any coming of an alien into the United States, from a foreign port or place," but the definition specified that a lawful permanent resident alien (LPR) returning from abroad would "not be regarded as making an entry into the United States * * * if the alien prove[d] * * * that his departure to a foreign port or place * * * was not intended or reasonably to be expected by him or * * * was not voluntary." 8 U.S.C. 1101(a)(13) (1994) (repealed 1996).

Construing that definition in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), this Court observed that it did "not think Congress intended to exclude aliens long resident in this country after lawful entry who have merely stepped across an international border and returned in 'about a couple of hours.'" *Id.* at 461. The Court therefore held "that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." *Id.* at 462.

In Section 301(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),

Pub. L. No. 104-208, Div. C, 110 Stat. 3009-575, Congress replaced the earlier definition of "entry" and specified the circumstances under which an LPR returning to the United States from abroad could be treated as seeking "admission," and therefore subject to limitations on admissibility contained in 8 U.S.C. 1182. The new definition of "admission" provides in relevant part as follows:

> (13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.
>
> * * * * *
>
> (C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—
>
> (i) has abandoned or relinquished that status,
>
> (ii) has been absent from the United States for a continuous period in excess of 180 days,
>
> (iii) has engaged in illegal activity after having departed the United States,
>
> (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,
>
> (v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

> (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

8 U.S.C. 1101(a)(13).

In 1998, the Board of Immigration Appeals (Board) determined that IIRIRA's definition of "admission" had "expressly preserve[d] some, but not all, of the *Fleuti* doctrine," and that a returning LPR described in Section 1101(a)(13)(C)(i)-(vi) "shall be regarded as 'seeking an admission' into the United States, without regard to whether the alien's departure from the United States might previously have been regarded as 'brief, casual, and innocent' under the *Fleuti* doctrine." *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1065-1066 (1998) (en banc).

2. a. Petitioner, a native and citizen of Greece, was admitted to the United States as an LPR in 1989. Pet. App. 2. In 1992, he participated in a scheme to manufacture and sell $50,000 in counterfeit traveler's checks. Administrative Record (A.R.) 288, 303. In December 1994, he was convicted upon a guilty plea of conspiracy to make or possess counterfeit securities in violation of 18 U.S.C. 371 and was sentenced to a four-month term of imprisonment. Pet. App. 2-3.

In 2003, petitioner left the United States to visit Greece. Upon his return, he sought entry into the United States as a returning LPR. Pet. App. 4; A.R. 360. In March 2003, he was placed in removal proceedings based on the charge that he was an arriving alien who was inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I) on account of his 1994 conviction for a crime involving moral turpitude. Pet. App. 4.

b. Before an immigration judge, petitioner conceded that he was removable but sought a waiver under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994) (repealed 1996). Pet. App. 4. Following a hearing, the immigration judge denied petitioner's application, finding that the equities did not warrant discretionary relief from removal, because, among other things, petitioner had made long and frequent trips to Greece where he had extensive family and business ties, and he "appear[ed] to be not merely remiss in his tax obligations [to the United States], but a serious tax evader." A.R. 111; see also Pet. App. 5. The immigration judge ordered petitioner removed to Greece. Pet. App. 5.

c. On appeal, the Board, in May 2008, "adopt[ed] and affirm[ed] the decision of the Immigration Judge." A.R. 51; see Pet. App. 5-6.

3. In July 2008, petitioner filed a motion with the Board to reopen the proceeding, alleging that he had received ineffective assistance of counsel. Pet. App. 6. He argued, in part, that he had been prejudiced by his previous attorneys' failure to challenge his removability on the ground that the statutory definition of "admission," as amended by IIRIRA in 1996, should not be applicable to him because "[h]e pled guilty to a crime of moral turpitude at a time when he would not be considered an alien seeking entry upon returning to the United States." A.R. 26; Pet. App. 6-7. In support of that argument, petitioner cited *Camins* v. *Gonzales*, 500 F.3d 872 (9th Cir. 2007), which held, under principles of non-retroactivity, that IIRIRA's partial repeal of the *Fleuti* doctrine was not applicable to LPRs who acted in reasonable reliance on the old law before IIRIRA's 1997 effective date. A.R. 26; Pet. App. 8.

The Board denied petitioner's motion to reopen. Pet. App. 29-32. In relevant part, the Board found that petitioner had failed to show that his prior counsel's performance had prejudiced his case, and that petitioner's reliance on the Ninth Circuit's decision in *Camins* was misplaced because it did not govern petitioner's proceeding (which was within the Second Circuit) and had been decided two years after petitioner had conceded his inadmissibility. *Id.* at 31-32.

4. Petitioner sought judicial review of the Board's decision, and the Second Circuit denied his petition for review. Pet. App. 1-28. The court concluded that, for purposes of his claim of ineffective assistance of counsel, petitioner had "failed to show prejudice under any standard." *Id.* at 13. The court of appeals first rejected petitioner's contention that his counterfeiting offense did not render him removable (a contention petitioner does not repeat in this Court). *Id.* at 13-15. The court of appeals then considered and rejected petitioner's argument about the applicability of the definition of "admission" in 8 U.S.C. 1101(a)(13)(C). Pet. App. 16-28.

The court of appeals concluded that the Board had "reasonably interpreted IIRIRA as superseding the *Fleuti* doctrine." Pet. App. 20. In considering whether that amendment "was impermissibly retroactive as applied to [petitioner]," the court applied the two-step inquiry prescribed by *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). Pet. App. 20. For purposes of the first step, the court noted that the government conceded that "Congress has not expressly prescribed the temporal reach of [the amended version of] § 101(a)(13)." *Id.* at 20-21. With respect to the second step of the *Landgraf* analysis, however, the court held that the amended definition did not have a genuinely retroactive effect on

petitioner, because he could not claim that he reasonably relied on the former version of the law in deciding to plead guilty to his counterfeiting offense. *Id.* at 21-27. The court explained that Section 1101(a)(13)(C)(v)—unlike former Section 212(c), which had been at issue in *INS* v. *St. Cyr*, 533 U.S. 289 (2001)—"does not hinge on either an LPR's conviction or his decision to plead guilty; rather, it turns on whether the LPR 'has *committed* an offense identified in [S]ection 1182(a)(2).'" Pet. App. 24 (quoting 8 U.S.C. 1101(a)(13)(C)(v)) (emphasis supplied by court).

Recognizing that some definitions in the INA refer to an alien's conviction and some refer to an alien's commission of an offense, the court of appeals concluded that "Congress intended the focus [in Section 1101(a)(13)(C)(v)] to be on the alien's commission of the crime." Pet. App. 25. The court further explained that it had "consistently rejected the notion that an alien can reasonably have relied on provisions of the immigration laws in 'committ[ing]' his crimes." *Ibid.* (brackets supplied by court). Accordingly, it held that applying Section 1101(a)(13)(C)(v) to petitioner's "January 2003 foreign trip—an event begun and completed long after the effective date of IIRIRA—is not impermissibly retroactive, for * * * it would border on the absurd to suggest that [petitioner] committed his counterfeiting crime in reliance on the immigration laws." *Id.* at 27.

The court of appeals noted that petitioner claimed two other circuits had reached a "contrary" conclusion. Pet. App. 27. But the court found those decisions "unpersuasive," in part because they had both "analyzed retroactivity in relation to the alien's plea of guilty" and had therefore failed to "address[]" the statute's "focus on the LPR's 'commi[ssion]' of the crime, or on the lack

of rationality in any claim that the LPR reasonably relied on the immigration laws in deciding to break the criminal laws." *Id.* at 27-28 (discussing *Camins*, *supra*, and *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004)).

The court of appeals thus held that Section 1101(a)(13)(C)(v) applies "to an LPR who, after the effective date of IIRIRA, makes a trip abroad and seeks to reenter the United States," and that petitioner was, accordingly, not prejudiced by his attorney's failure to contest petitioner's removability on nonretroactivity grounds. Pet. App. 28.

ARGUMENT

Petitioner renews his contention (Pet. 5-16) that the definition of "admission" in 8 U.S.C. 1101(a)(13)(C)(v) should not be applied to him. Specifically, he contends (Pet. 14) that "he detrimentally relied on the prior [version of the] law at the time of [his] guilty plea," under which he would have been allowed "to take innocent, casual, and brief trips outside the United States without subjecting himself to a charge of inadmissibility." Petitioner's argument lacks merit. Although there is some disagreement among the circuits, the Second Circuit correctly noted (Pet. App. 27-28) that the only other circuits to have addressed the question—the Fourth and the Ninth Circuits—did not consider the Second Circuit's reasoning, which is supported by the text of the statute. Because that rationale may persuade other circuits, and perhaps persuade the Fourth and Ninth Circuits to revise their views, review of the question by this Court would be premature. Moreover, the issue is of limited significance, as it involves the applicability of a statutory repeal and amendment that occurred more

than 15 years ago and has precipitated only a handful of cases.[1]

1. The court of appeals correctly held that the application of 8 U.S.C. 1101(a)(13) does not have retroactive effect when applied to an LPR who committed an offense before IIRIRA took effect in 1997, and who then departed from and returned to the United States in 2003. Petitioner contends (Pet. 13-16) that he reasonably relied on the pre-IIRIRA *Fleuti* doctrine in deciding to plead guilty to an offense of conspiring to make or possess counterfeit securities in violation of federal law. As an initial matter, petitioner's claim of reliance is distinguishable from the one that this Court found persuasive in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), in which the alien pleaded guilty to an aggravated felony under a plea agreement that provided for a sentence of five years or less, and thus preserved his eligibility at the time for discretionary relief under Section 212(c) of the INA. See *id.* at 323 (describing circumstances of an alien whose "sole purpose" in plea negotiations was to "ensure" a sentence of less than five years); see also *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 43-44 & n.10 (2006) (distinguishing alien's claim of non-retroactivity from the one in *St. Cyr* because the alien had not availed himself of pre-IIRIRA provisions or taken action "that enhanced their significance to him in particular, as

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[1] A similar, but materially distinguishable, question is presented by the pending petition for a writ of certiorari in *Myers* v. *Holder*, No. 10-1178 (filed Mar. 24, 2011). In that case, the alien did not plead guilty to the underlying offense, which caused the Ninth Circuit to distinguish its earlier decision in *Camins* v. *Gonzales*, 500 F.3d 872 (2007). See *Myers* v. *Holder*, 409 Fed. Appx. 69, 70 (2010). Because petitioner focuses on his guilty plea (see Pet. ii), a victory for him in this Court would not necessarily benefit the petitioner in *Myers*.

St. Cyr did in making his *quid pro quo* agreement"). In this case, petitioner does not suggest that his guilty plea reflected such a *quid pro quo* agreement. But petitioner's focus on his guilty plea is also misdirected for two additional reasons.

a. First, as the court of appeals explained (Pet. App. 22-25), the prior conduct that triggers the amended definition of "admission" is not petitioner's decision to plead guilty. Instead, the statutory text expressly refers to whether an LPR "has *committed* an offense identified in section 1182(a)(2)." 8 U.S.C. 1101(a)(13)(C)(v) (emphasis added). Petitioner does not dispute that he indeed "committed" such an offense. Nor does he dispute the court of appeals' observation that "it would border on the absurd to suggest" that an alien reasonably relied on the present status of the immigration laws in committing a crime. Pet. App. 27. See also, *e.g.*, *Saravia-Paguada* v. *Gonzales*, 488 F.3d 1122, 1133-1135 (9th Cir. 2007), cert. denied, 553 U.S. 1064 (2008); *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2d Cir. 2000), aff'd, 533 U.S. 289 (2001); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000).

Petitioner instead argues (Pet. 8-12) that the court of appeals erred in focusing on the word "committed" in Section 1101(a)(13)(C)(v) "without discerning its meaning in conjunction with" the provision it cross-references, Section 1182(a)(2). Pet. 9. The latter provision—at least with respect to crimes involving moral turpitude— makes an alien inadmissible only when the alien has been "convicted of, or admits having committed," such an offense. 8 U.S.C. 1182(a)(2)(A)(i)(I). Petitioner thus asserts (Pet. 8) that the Second Circuit erred

in holding that an LPR is "inadmissible to the United States without being convicted or admitting to a crime involving moral turpitude."[2] But the Second Circuit spoke only to whether an LPR would be deemed to be seeking admission, not whether he would be found inadmissible.

Petitioner's argument depends entirely on his assumption that the definition of "admission" "only comes into play if the LPR is *actually inadmissible*." Pet. 10 (emphasis added). But he provides no basis for that assumption, which is refuted by the text of the statute. As the court of appeals noted, some definitions in the INA turn on convictions, while others turn on the commission of offenses, and Congress's distinctions between the two were presumably intentional. Pet. App. 25 (citing *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)).

Moreover, Section 1101(a)(13)(C) merely ensures that certain LPRs returning to the United States after traveling abroad will "be regarded as seeking admission into the United States for purposes of the immigration laws." 8 U.S.C. 1101(a)(13)(C). There is no reason to conclude that Congress intended that the category of LPRs who would be subject to an inquiry about their admissibility would be limited to those LPRs who are in fact inadmissible. To the contrary, the definition of "admission" plainly requires some LPRs to be examined for inadmissibility (and thus *potentially* refused admission) on the basis of facts that would not in the end suffice to

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[2] Petitioner asserts (Pet. 12) that the record "is devoid of any reference to [his] admission of a crime involving moral turpitude." But he was, of course, *convicted* of such an offense, which suffices to make him inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I), and his guilty plea in federal court satisfied the requirements that he identifies (Pet. 12) for an admission that he committed such an offense.

actually render them inadmissible. For instance, 8 U.S.C. 1101(a)(13)(C)(ii) applies to an LPR who "has been absent from the United States for a continuous period in excess of 180 days," even though that is not a ground of inadmissibility. Petitioner thus demonstrably errs in collapsing the category of those LPRs who may be subjected to an inquiry into their admissibility with the category of those LPRs who will actually be found inadmissible.

Furthermore, in the specific context of criminal aliens (*i.e.*, the category specifically addressed by Section 1101(a)(13)(C)(v)), it is entirely reasonable for Congress to require an LPR who has "committed" an offense to undergo examination even if more might be required to make that alien inadmissible under Section 1182(a)(2). Thus, in *Odoku* v. *INS*, 276 Fed. Appx. 21 (2008), the Second Circuit held that the Board had reasonably read Section 1101(a)(13)(C)(v) to require an LPR to be "treated as an arriving alien" when he had already been *indicted* for a crime involving moral turpitude but was not actually *convicted* of that offense until several months after he returned to the United States. *Id.* at 24.

b. The second reason petitioner errs in focusing on his guilty plea is that the determinative event for retroactivity analysis is not just petitioner's pre-1996 criminal conduct, but also conduct that occurred well *after* the enactment of the revised definition. In order for an LPR to be "regarded as seeking an admission into the United States" under 8 U.S.C. 1101(a)(13)(C), it is necessary not only that he have committed a certain kind of offense; he must also depart from and return to the United States.

Here, petitioner's 2003 departure from and return to the United States both occurred many years after the 1997 effective date of the new definition of "admission." Thus, petitioner could have avoided the application of the statute. After IIRIRA became effective in 1997, petitioner could have refrained from departing from the United States (or from returning to the United States). He could also have attempted to avoid the consequences of the "admission" definition by, in advance of his departure and return, filing and obtaining approval of his application for relief under former Section 212(c). To paraphrase this Court's most recent decision addressing retroactivity in the immigration context: "It is therefore the alien's choice" to depart and seek to re-enter the country "after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out." *Fernandez-Vargas*, 548 U.S. at 44. Cf. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 275 (1994) ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.").[3]

Accordingly, the court of appeals did not err in concluding that an LPR who departed from and returned to the United States in 2003 can be deemed to have been seeking admission if he committed a crime involving moral turpitude before IIRIRA became effective.

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[3] Like the alien in *Fernandez-Vargas*, see 548 U.S. at 44 n.10, petitioner does not claim that he has a "vested right[]" to the matter at issue (the ability to depart from and return to the United States on a brief, casual, and innocent basis, without regard to his admissibility).

2. Petitioner contends (Pet. 6-7) that the decision below conflicts with the decisions of the Fourth and Ninth Circuits in *Olatunji* v. *Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004), and *Camins* v. *Gonzales*, 500 F.3d 872 (9th Cir. 2007). But *Olatunji* was decided before this Court's decision in *Fernandez-Vargas* (which also went unacknowledged by the Ninth Circuit in *Camins*.) Moreover, as the Second Circuit explained (Pet. App. 27-28), the other two courts simply assumed that the determinative event for retroactivity analysis was an LPR's guilty plea. See *Olatunji*, 387 F.3d at 396 (explaining that the court's retroactivity analysis turned on "new legal consequences" associated with the defendant's "decision to plead guilty" and the resulting "*conviction*"); *Camins*, 500 F.3d at 882-883 (same). The government in those cases did not—as it and the Second Circuit did in this case—press the statutory language focusing on whether the LPR "committed" an offense. Thus, although the Second Circuit has rejected the analysis of the other two courts, neither of them has rejected the Second Circuit's rationale.

Because the Second Circuit's reasoning is, as discussed above, strongly supported by the statutory text, it could well persuade other circuits. In turn, the Fourth and Ninth Circuits might also be persuaded to revisit the issue and adopt that rationale. Accordingly, review by this Court now would be premature.

3. Even if the question were otherwise worthy of this Court's review at this time, this case would be a poor vehicle because it is by no means clear that petitioner would qualify for relief under the pre-IIRIRA *Fleuti* doctrine, under which "the significance of an absence will depend upon the relevant factors and circumstances found in each case." *Heitland* v. *INS*, 551 F.2d

495, 504 (2d Cir.), cert. denied, 434 U.S. 819 (1977). Here—presumably in part because petitioner raised this issue for the first time in his motion to reopen proceedings before the Board—there is little evidence in the record about the circumstances of petitioner's travels to Greece. The trip from which he returned on January 29, 2003, was one-week long, but the only evidence in the record about its purpose is petitioner's vague assertion to an INS officer that it was for "[f]amily business." A.R. 318. In addition, as the immigration judge noted in determining that the equities did not support petitioner's request for relief under former Section 212(c), aside from that particular trip, petitioner spent significant periods of time in Greece, ranging from two to nine months per year. A.R. 111-112. In *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), this Court noted that "an alien wishing to retain his classification as a permanent resident of this country imperils his status by interrupting his residence *too frequently* or for an overly long period of time." *Id.* at 461 (emphasis added). There is thus reason to believe petitioner could be treated as seeking "entry" into the United States even under pre-IIRIRA law.[4]

4. Finally, petitioner asserts in passing (Pet. 6) that the decision below will "adversely affect thousands of LPRs who are deemed to have *committed* but were *not convicted* nor *admitted to* [having committed] an offense * * * prior to April 1, 1997, upon return from innocent, casual and brief trips abroad." But he provides no support for that assertion, and there appears to be none.

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[4] Petitioner makes no attempt in this Court to explain why he would qualify for relief under the *Fleuti* doctrine. In the court of appeals, he simply asserted, without further explanation, that it is "patently clear" that his "departure from the United States for merely *one week* was brief, casual, and innocent." Pet. C.A. Br. 14.

Indeed, although Section 1101(a)(13)(C)(v) was added in 1996, there appear to be only three reported court of appeals decisions (*Olatunji*, *Camins*, and the decision below) addressing its applicability under principles of non-retroactivity.[5] Accordingly, the issue does not warrant this Court's further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2011

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[5] The First Circuit's decision in *Nadal-Ginard* v. *Holder*, 558 F.3d 61 (2009), involved the admissibility of an LPR with pre-IIRIRA convictions for crimes involving moral turpitude, but that court did not consider any retroactivity-based challenge to the applicability of Section 1101(a)(13)(C)(v). In most other reported cases discussing that provision, the alien's offense was committed after IIRIRA. As a result, those cases did not implicate the question presented by the petition here.

REPLY BRIEF

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No. 10-1211

In The

Supreme Court of the United States

PANAGIS VARTELAS,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Petitioner, Panagis Vartelas, herewith submits his Reply to the Brief for the Respondent in Opposition.

ISSUES BEFORE THE COURT

The questions presented for review involve a direct conflict in the Circuits relating to the retroactivity of 8 U.S.C. § 1101(a)(13)(C)(v).

1. Whether the Second Circuit erred in misconstruing the significance of the term "committed" as used in 8 U.S.C. § 1101(a)(13)(C)(v) when the court below focused its analysis of the retroactivity of 8 U.S.C. § 1101(a)(13)(C)(v) merely on the commission of an offense without reading the provision in conjunction with 8 U.S.C. § 1182(a)(2)(A)(i)(I) which requires a conviction or admission to a crime involving turpitude to trigger inadmissibility to the United States.

2. Whether the Second Circuit misapplied the second step test articulated in *Landgraf v. USI Film Prods,* 511 U.S. 244 (1994), in analyzing whether 8 U.S.C. § 1101(a)(13)(C)(v), which effectively repealed the "innocent, casual, and brief" doctrine espoused in *Rosenberg v. Fleuti,* 374 U.S. 449 (1963), can be retroactively applied to the petitioner's guilty plea taken prior to the enactment and the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 301(a), 110 Stat. 3009-575 (1996).

3. Whether the Second Circuit erred in refusing to recognize that the amendment denies the petitioner's vested right of returning to his lawful permanent residence and attaches a new legal consequence to the petitioner's guilty plea which renders him inadmissible upon return from a brief travel outside the United States subsequent to the effective date of IIRIRA.

ARGUMENT IN REPLY

I. There Was a *Quid Pro Quo* Agreement as in *St. Cyr*

Upon returning from Greece to JFK airport in New York on January 29, 2003 after an absence of one week, the petitioner was found inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude in 1994. The Solicitor General contends that the petitioner's reliance on the *Fleuti* doctrine is distinguishable from *INS v. St. Cyr*, 533 U.S. 289 (2001) in that there was no *quid pro quo* agreement as in *St. Cyr*. (Opp. 9-10). On the contrary, as in *St. Cyr*, the petitioner pled guilty to a crime involving moral turpitude and waived his constitutional right to a trial (a *quid pro quo* agreement) in reasonable reliance on the pre-IIRIRA immigration laws, inclusive of the *Fleuti* doctrine that would have allowed him to continue to take brief trips abroad without facing adverse immigration consequences upon his return, notwithstanding his guilty plea.

II. The Term "Committed" As Used in § 1101(a)(13)(C)(v) Must Be Construed in the Context of § 1182(a)(2)

The Solicitor General and the Second Circuit's statutory interpretation of 8 U.S.C. §·1101(a)(13)(C)(v) is incorrect in the context of proper retroactivity analysis. The very language relied on by the Second Circuit would render the statute superfluous if "committed an offense identified in section 1182(a)(2)" is interpreted independently from the inquiry of whether a returning lawful permanent resident (LPR) is actually admissible.

In reviewing statutes the legislature is presumed not to use any superfluous language, *Baily v. U.S.*, 516 U.S. 137, 145 (1995). *See* also *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990), where this Court held that "[o]ur cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."

There is no question that under 8 U.S.C. § 1101(a)(13)(C)(v) a returning LPR is deemed to be seeking admission if he or she has committed an offense identified in 8 U.S.C. § 1182(a)(2). However, contrary to the Solicitor General's assertion, the issue of whether an LPR is inadmissible under § 1182(a)(2) is relevant to a determination as to whether an alien will be deemed under 8 U.S.C. § 1101(a)(13)(C)(v) to be seeking admission since 8 U.S.C. § 1182(a)(2) requires

an actual conviction or formal admission of acts constituting a crime involving moral turpitude.

The explicit terms of 8 U.S.C. § 1182(a)(2) state in relevant part that an "alien is inadmissible if he or she has been *convicted* of, or *admits having committed*, or *admits committing* acts which constitute the essential elements of – a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime. . . ."

As such an LPR is not inadmissible merely upon commission of a crime of moral turpitude – an LPR is only inadmissible if he has admitted or been convicted of a crime of moral turpitude. The admission to a crime involving moral turpitude must comply with stringent administrative safeguards set forth by agency case law. (Pet. 12). This is precisely the statutory and administrative reason why the petitioner was charged with having been convicted of and not for having committed a crime of moral turpitude under § 1182(a)(2)(A)(i)(I).

Therefore, the Second Circuit erred when it held that "section [i.e. § 1101(a)(13)(C)(v)] does not hinge on either a returning LPR's conviction or his decision to plead guilty." 620 F.3d at 119. In fact, in the absence of a conviction or admission of a crime involving moral turpitude, 8 U.S.C. § 1101(a)(13)(C)(v) simply does not apply.

III. The Determinative Event That Triggers Retroactivity Analysis Is the Petitioner's Guilty Plea And Not the Commission of an Offense

The Solicitor General contends that the determinative event for retroactivity analysis is not the petitioner's pre-IIRIRA guilty plea but the petitioner's "commission" of an offense and also includes conduct that occurred well after the enactment of the revised definition. The Solicitor General also maintains that the petitioner should have refrained from ever traveling, regardless of the duration or purpose, outside the United States (Opp. 12). The Solicitor General's contention is without statutory basis.

This Court has ruled that whether "a particular application is retroactive will depen[d] upon what one considers to be the event by which retroactivity or prospectivity is to be calculated." *Republic National Bank of Miami v. United States*, 506 U.S. 80, 100 (1992).

In the present case, as in *St. Cyr*, the determinative event is the guilty plea (an event subsequent to the criminal act) and not the commission of the crime insofar as the petitioner was not deportable at the time and would not have been inadmissible under former pre-IIRIRA law as a result of pleading guilty to a crime of moral turpitude. When petitioner pled guilty to a crime of moral turpitude in 1994, he retained the right under the pre-IIRIRA law existing at such time to make "innocent, casual, and brief"

overseas trips without being subjected to a charge or finding of inadmissibility upon his return to the United States.

Therefore, because the determinative event of the guilty plea occurred before the effective date of IIRIRA in reliance on the *Fleuti* doctrine, the subsequent event of departure after the effective date is irrelevant.

IV. The Circuit Split Has To Be Resolved by this Court and the Solicitor General's Reliance on *Fernandez-Vargas* Is Misplaced

The Solicitor General contends that the Second Circuit was correct in refusing to follow the retroactivity analysis utilized in both *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007) and *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). The Second Circuit chose to focus its statutory analysis on the "commission of an offense" rather than the proper retroactivity analysis based on a pre-IIRIRA guilty plea. Therefore, the conflicts between the Circuits must be reviewed by this Court. The Solicitor General incorrectly suggests that the issue should be revisited by the Fourth and Ninth Circuits based on the Second Circuit's reasoning. (Opp. 13).

More importantly, the Solicitor General's reliance on *Fernandez-Vargas v. Gonzales,* 548 U.S. 30 (2006), (Opp. 13-14), in his retroactivity analysis is misplaced. The Solicitor General asserts that *Fernandez-Vargas* was decided before *Olatunji* and went unnoticed by

the *Camins* court. The Solicitor General failed to mention that *Fernandez-Vargas* went unnoticed by the Second Circuit as well. Also, the petitioner's brief trip abroad occurred before *Fernandez-Vargas* was decided in 2006.

In *Fernandez-Vargas* this Court ruled that the reinstatement statute in that case applied to illegal aliens who re-entered the United States before the effective date of the statute, and that the application to such aliens was not impermissibly retroactive. The Court held that the purpose of the statute was most consistent with a broad application, and "common principles of statutory interpretation fail to unsettle the apparent application § 241(a)(5) to any re-entrant present in the country, whatever the date of return." *Id.* at 41, 42. Fernandez-Vargas's offense was not a "past act that he is helpless to undo," *id.* at 44, but rather the "continuing violation," *id.* at 46, of remaining in the country illegally. This is not the case of the petitioner herein.

The majority opinion in *Fernandez-Vargas* affirmed the presumption against retroactive statutes, but found the reinstatement statute permissible under a test set out in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

This Court in *Landgraf* articulated a two-step test for determining whether a federal statute applies retroactively. First, "absent clear congressional intent favoring" retroactive application, the court must move to the second step of the *Landgraf* test. The first step

is not an issue in this case as conceded by the government (Opp. 6).

Under the second step, this Court determined that statutes are disfavored as retroactive when their application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280.

The Court in *Fernandez-Vargas* affirmed that "[t]he modern law thus follows Justice Story's definition of a retroactive statute as 'tak[ing] away or impair[ing] vested rights acquired under existing laws, or creat[ing] a new obligation impos[ing] a new duty, or attach[ing] a new disability, in respect to transaction or considerations already past.'" *Fernandez-Vargas, supra,* at 37. (internal citation omitted).

Since the petitioner herein pled guilty to a crime of moral turpitude in 1994, he retained the vested and substantive rights under the pre-IIRIRA law existing at such time for an LPR to make "innocent, casual, and brief" overseas trips without being exposed to a charge or finding of inadmissibility upon return to the United States.[1]

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[1] The Solicitor General contends that the petitioner does not claim that he has a "vested right" to the matter at issue. (Opp. 13, n.13). The vested right is self-evident as the retroactive statute in question does impair and take away the petitioner's right to travel briefly under the existing law. In addition, the statute is retroactive as the new law attaches a new disability to

(Continued on following page)

Unlike the petitioner who was returning to his lawful permanent residence in the United States, Fernandez-Vargas chose to continue his illegal presence, after illegal re-entry and after the effective date of the new law, and later sought to adjust his illegal status. *Id.* at 42, 43.

In addition, adjustment of status, among other reliefs, as a putative claim to relief is not a vested right, a term that describes something more substantial than inchoate expectations and unrealized opportunities. *Id.* at 44, n.10.

Fernandez-Vargas could have sought "[s]ome varieties of discretionary relief," *id.* at 33, before the new law came into effect. Instead he chose to continue his illegal status and challenged the application of the new law as impermissibly retroactive to him.

The Solicitor General reasons that the petitioner has not attempted to avoid the consequences of the "admission" by refraining from departing from the United States and by filing in advance an application for relief under former Section 212(c). (Opp. 13). However, the petitioner herein was not required to take affirmative steps before his brief trip abroad simply because under the *Fleuti* doctrine the petitioner

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petitioner's decision to plead guilty by now rendering him inadmissible based on his decision to plead guilty to a crime of moral turpitude. Thus, in reliance on the *Fleuti* doctrine, the petitioner should not be deemed to be seeking admission even if the brief trip occurred after the effective date of the new law.

would not have been deemed to be seeking "entry" or "admission."

Therefore, "commonsense, functional judgment," *Martin v. Hadix,* 527 U.S. 343, 357 (1999), dictates that 8 U.S.C. § 1101(a)(13) has a detrimental retroactive effect when applied to the petitioner who was denied his vested rights upon returning to his lawful and permanent place of abode in the United States after a brief trip abroad.

CONCLUSION

For the foregoing reasons, the Court should grant the instant petition for a writ of certiorari to resolve the split between the Fourth and Ninth Circuits, and the Second Circuit involving a legal issue of significant importance requiring national uniformity.

Respectfully submitted,

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AUGUST 2011

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 10-1211

Supreme Court, U.S.
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In The
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On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTION PRESENTED

Is 8 U.S.C. § 1101(a)(13)(C)(v), which has been interpreted as depriving certain lawful permanent residents of their right to take brief trips abroad without being denied reentry, impermissibly retroactive as applied to lawful permanent residents who pleaded guilty before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 620 F.3d 108. The decision of the Board of Immigration Appeals (BIA) (Pet. App. 29-32) is unreported but available at 2009 WL 331200 (Jan. 23, 2009).

JURISDICTION

The court of appeals entered its judgment on September 9, 2010 and denied a timely petition for rehearing and rehearing en banc on January 4, 2011 (Pet. App. 33). The petition for a writ of certiorari was filed on April 4, 2011 and granted on September 27, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this brief (App. 1-8) are the pertinent portions of:

(a) former Immigration and Nationality Act (INA) § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994), as in effect before 1997 (App. 1);

(b) current INA § 101(a)(13)(A), (C), 8 U.S.C. § 1101(a)(13)(A), (C), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C,

§ 301(a), 110 Stat. 3009-575 (enacted Sept. 30, 1996, effective Apr. 1, 1997) (App. 2-3);

(c) current INA § 212(a)(2)(A)-(D), 8 U.S.C. § 1182(a)(2)(A)-(D) (App. 3-7); and

(d) former INA § 212(c), 8 U.S.C. § 1182(c) (1994), as in effect before 1996, when it was amended and later repealed effective April 1, 1997 by IIRIRA, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597 (App. 8).

INTRODUCTION AND STATEMENT OF THE CASE

In the early 1990s, petitioner played a small role in a counterfeiting scheme, pleaded guilty, and was sentenced to four months' incarceration. Until 1997, lawful permanent residents had the right to take brief trips abroad without risk of being denied reentry upon their return. Thereafter, IIRIRA changed the law by adding INA § 101(a)(13)(C)(v). That subsection provides that a lawful permanent resident who returns from a trip abroad "shall not be regarded as seeking an admission" unless he "has committed an offense identified in [INA § 212(a)(2), 8 U.S.C.] section 1182(a)(2)." The BIA has interpreted that subsection as abridging certain lawful permanent residents' right to travel abroad and return. Specifically, lawful permanent residents who have been convicted of certain types of offenses are now inadmissible upon their return from brief trips

abroad, regardless of whether they are deportable for those same offenses if they remain in this country.

Even if this is the proper interpretation of § 101(a)(13)(C)(v), Congress did not provide for that subsection to apply retroactively to lawful permanent residents who committed offenses before IIRIRA's effective date. First, this Court requires a clear statement from Congress that a statutory provision applies retroactively, and none is present here. Second, if applied to lawful permanent residents who committed offenses before its enactment, § 101(a)(13)(C)(v) would retroactively impose a substantial new disability and penalty upon them for their pre-IIRIRA offenses. They would have to surrender their pre-IIRIRA right to travel abroad, on pain of being removed from this country upon their return. Imposing the disability of not being able to travel abroad, or the penalty of removal upon doing so, would disrupt their settled expectations.

Applying § 101(a)(13)(C)(v) retroactively would also undermine lawful permanent residents' reasonable reliance, when deciding to plead guilty, on their pre-IIRIRA right to travel. Particularly given the canon of construing lingering ambiguities in favor of the immigrant, § 101(a)(13)(C)(v) cannot apply to conduct that predated IIRIRA.

I. STATUTORY BACKGROUND

A. The Immigration and Nationality Act of 1952 (INA)

The main statute governing immigration is the Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1101 et seq.). Until it was amended by IIRIRA, the key event that determined many persons' immigration status was an "entry." *See Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (*Mezei*). The INA defined entry as "any coming of an alien into the United States, from a foreign port or place." INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994). The INA definition also considered intent: it explicitly excepted from its scope a lawful permanent resident (colloquially, a "green-card holder") who showed that "his departure to a foreign port or place . . . was not intended or reasonably to be expected by him." *Id.*

Thus, not every return from a trip abroad amounted to an entry. In *Rosenberg* v. *Fleuti*, the government sought to deport a lawful permanent resident on the ground that he was excludable upon returning from a several-hour visit to Mexico. 374 U.S. 449, 450-51 (1963) (*Fleuti*). This Court "construe[d] the intent exception to § 101(a)(13) as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." *Id.* at 462. A lawful permanent resident's "innocent, casual, and brief" trip abroad,

this Court held, "may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." *Id.*

The definition of entry mattered because those who were denied entry at the border faced exclusion hearings. In contrast, those who gained entry (or, under *Fleuti*, had not made a new entry) could be removed only through deportation hearings, which afforded greater due process safeguards. *See, e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 32-34 (1982) (*Plasencia*); *Mezei*, 345 U.S. at 212; *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596-99 (1953). Furthermore, the grounds for deportation were narrower than the grounds for exclusion. *Compare* INA § 241(a), 8 U.S.C. § 1251(a) (1994), *with* INA § 212(a), 8 U.S.C. § 1182(a) (1994). For instance, an immigrant who had been convicted of or admitted to committing a "crime involving moral turpitude" was generally excludable. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i) (1994). He was not deportable, however, unless he had been convicted of at least two such crimes, or one such crime with a prison sentence of a year or more within five years of entry. INA § 241(a)(2)(A)(i), (ii), 8 U.S.C. § 1251(a)(2)(A)(i), (ii) (1994). Thus, until IIRIRA, a lawful permanent resident who had been sentenced to and served less than one year in prison for committing just one crime involving moral turpitude was not deportable. Though he might become excludable if he sought entry after a long absence, he

could return from brief trips abroad without ever making an entry. *Fleuti*, 374 U.S. at 462.

"Crime involving moral turpitude" is a term of art that the INA uses but nowhere defines. *See, e.g.*, INA §§ 101, 212(a)(2)(A)(i)(I), 240(a)(2)(A)(i)(I), 8 U.S.C. §§ 1101, 1182(a)(2)(A)(i)(I), 1251(a)(2)(A)(i)(I) (1994). That category encompasses many offenses that are not necessarily serious but require a certain level of *mens rea*. It has been interpreted to include a wide range of offenses, including misdemeanors like stealing bus transfer passes and jumping subway turnstiles to avoid paying the fare. *Michel* v. *INS*, 206 F.3d 253, 256, 262-65 (2d Cir. 2000) (Sotomayor, J.); *Santos-Gonzalez* v. *Reno*, 93 F. Supp. 2d 286, 288 n.2 (E.D.N.Y. 2000). In contrast, the category has been interpreted to exclude at least some forms of burglary, statutory rape, and domestic violence. *Wala* v. *Mukasey*, 511 F.3d 102, 109-10 (2d Cir. 2007) (Sotomayor, J.); *Quintero-Salazar* v. *Keisler*, 506 F.3d 688, 691, 694 (9th Cir. 2007); *Fernandez-Ruiz* v. *Gonzales*, 468 F.3d 1159, 1163-69 (9th Cir. 2006).

B. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)

In 1996, Congress passed sweeping amendments to the INA in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1101 et seq.). IIRIRA

substituted "admission" for "entry" as the key event determining many immigrants' status. IIRIRA § 301(a) (codified at INA § 101(a)(13), 8 U.S.C. § 1101(a)(13)). Immigrants ineligible for admission at a point of entry are now called "inadmissible" (not "excludable"). INA § 212(a), 8 U.S.C. § 1182(a). Those who had been admitted but are not allowed to stay are still called "deportable." INA § 237(a), 8 U.S.C. § 1227(a). Inadmissible and deportable immigrants are now collectively called "removable" and are subject to the same procedural mechanism: a removal proceeding. *See* INA § 240, 8 U.S.C. § 1229a.

IIRIRA defines "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A). The government "bears the burden of proving by clear and convincing evidence that a returning lawful permanent resident" should be treated as "seeking an admission" under INA § 101(a)(13)(C). *In re Rivens*, 25 I. & N. Dec. 623, 625-26 (BIA 2011). In 1998, the Board of Immigration Appeals (BIA) reviewed IIRIRA's new definition of "admission" and determined that the *Fleuti* defense "does not survive the enactment of IIRIRA as a judicial doctrine." *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1065-66 (BIA 1998) (en banc). The BIA reasoned that because the new definition removed the word "intended," it eliminated the intent exception on which *Fleuti* had relied. *Id.* at 1065-66. *But see id.* at 1075 (Rosenberg, Bd. Mem., dissenting) ("[T]he statute is utterly silent as

to the continued vitality of the *Fleuti* doctrine."). This Court has never passed on whether the *Fleuti* doctrine survives IIRIRA, but petitioner assumes for the sake of argument that it does not.

In another significant change, IIRIRA repealed INA § 212(c), which had allowed lawful permanent residents to seek discretionary relief from exclusion or deportation. 8 U.S.C. § 1182(c). IIRIRA replaced § 212(c) with a narrower discretionary provision, called "cancellation of removal," with generally stricter eligibility criteria. *See* IIRIRA § 304 (codified as amended at INA § 240A, 8 U.S.C. § 1229b). In *INS* v. *St. Cyr*, this Court held that the repeal of § 212(c) does not operate retroactively against lawful permanent residents who were eligible for § 212(c) relief when they pleaded guilty. 533 U.S. 289, 326 (2001).

Because IIRIRA made such sweeping changes, Congress delayed its effective date, providing that most of its provisions would take effect on April 1, 1997. *See* IIRIRA § 309(a).

II. FACTS AND PROCEDURAL HISTORY

1. Petitioner Panagis Vartelas, a native and citizen of Greece, has resided in the United States for more than three decades. *See* Administrative Record (AR) 281. He received a student visa at the end of 1979 and came to the United States to study at Queens College. *See id.* at 281, 293. He married a U.S. citizen in 1985 and became a lawful permanent resident in 1989. *Id.* at 185, 254, 281, 321. In the

early 1990s, Mr. Vartelas and his wife had two children, both of whom are U.S. citizens.[1] *Id.* at 191-92, 240, 254. He remains in close contact with them and continues to support them financially, working as a sales manager for a roofing company. *Id.* at 191-92, 200-01, 241-42, 254. He also helps his elderly parents with their family-run bed and breakfast in Greece, which on occasion requires him to travel there. *See id.* at 198-99, 324.

2. In 1992, Mr. Vartelas opened an auto body shop in Queens, New York. AR 186. One of his partners in the shop leased a photocopier to make counterfeit traveler's checks. *Id.* at 186-88, 299-302. When his partner asked Mr. Vartelas for assistance, Mr. Vartelas helped him perforate the sheets into individual checks. *Id.* He neither sold the checks nor received any money from them. *Id.* at 188. In 1994, he pleaded guilty to conspiring to make or possess a counterfeit security, in violation of 18 U.S.C. § 371. *Id.* at 309. The prosecutor agreed that Mr. Vartelas's guilty plea allocution would qualify him for a two-level sentence reduction for acceptance of responsibility. *Id.* at 288-89; U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (1994). That two-level reduction subtracted four months from both the top and the bottom of the guideline range, reducing it to four to ten months' imprisonment. *See* AR 312; U.S.

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[1] Mr. Vartelas and his first wife have divorced, and he has remarried another U.S. citizen, though those facts are not in the record.

SENTENCING GUIDELINES MANUAL ch. 5, pt. A (1994) (sentencing table). The sentencing judge sentenced him to four months' incarceration followed by two years' supervised release, a sentence at the bottom of the range. AR 310-12. His conviction did not make him deportable. Years later, the immigration judge found that Mr. Vartelas "was not a major actor in the crime." *Id.* at 123.

3. From January 22 to 29, 2003, Mr. Vartelas traveled to Greece to assist his parents with their family business. *See* AR 317-18. Upon his return, an immigration officer questioned him about his 1994 conviction. *Id.* at 319. Mr. Vartelas explained that he was unaware that his 1994 conviction would impede his return to the United States. *Id.* at 319.[2]

4. In March 2003, the government issued a notice to appear, placing Mr. Vartelas in removal proceedings. The government claimed that he was inadmissible under INA § 212(a)(2)(A)(i)(I) upon his return to this country because he had been convicted of a crime involving moral turpitude in 1994. AR 359-61. Mr. Vartelas appeared before an immigration judge at a series of hearings, but his initial attorney failed to appear twice and failed to submit

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[2] Mr. Vartelas had previously made other trips to Greece in the years following his conviction and the enactment of IIRIRA. *See, e.g.*, AR 192-93, 222. He had never encountered any difficulties reentering this country and had never been told that he was seeking an admission or was inadmissible, though these facts are not in the record.

a requested brief. *Id.* at 132-77. At a 2005 hearing, his attorney indicated that he would challenge IIRIRA's retroactive application to Mr. Vartelas's pre-IIRIRA offense. *Id.* at 150-51. But at the next hearing, he conceded that Mr. Vartelas was removable on the ground that he was inadmissible when he returned to the United States. *Id.* at 155, 359-61; *see* INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I). His attorney did not question whether *Fleuti* had been superseded, whether Mr. Vartelas's brief trip qualified for the *Fleuti* doctrine, or whether IIRIRA's definition of "seeking an admission" in § 101(a)(13)(C)(v) could apply retroactively based on the pre-IIRIRA conviction. AR 155. Instead, he requested discretionary relief from removal under former § 212(c) of the INA. *Id.* at 108-09, 156.

In 2006, the immigration judge denied that request. AR 116. The judge expressed doubt, however, about whether the attorney was correct to concede removability: "The crime, while one of moral turpitude[,] may not have been an excludable offense when he committed it, but he clearly has conceded removability." *Id.* The BIA affirmed, discussing only the factors relating to discretionary relief under former § 212(c). *Id.* at 51, A22 670 589, 2008 WL 2401105 (BIA May 1, 2008) (unpublished).

5. Represented by new counsel, Mr. Vartelas filed a timely motion to reopen and remand his case on the ground that his prior counsel had been ineffective for, among other reasons, conceding his removability. AR 13-30. The motion requested permission to

withdraw that concession on the ground that INA § 101(a)(13), as amended by IIRIRA, cannot apply retroactively to his pre-IIRIRA guilty plea. *Id.* at 23-27.

The BIA denied the motion. It noted that the immigration judge had found "that [previous counsel] had been derelict in his duty." Pet. App. 31. Nevertheless, the BIA held that Mr. Vartelas had not proven prejudice because his argument against applying § 101(a)(13) retroactively "[wa]s misplaced." *Id.*

The court of appeals denied Mr. Vartelas's timely petition for review of the BIA's decision. Pet. App. 28. The court first rejected his argument that the counterfeiting conviction was a petty offense that did not make him removable. Pet. App. 13-15. It then reviewed the retroactivity holding de novo, first explaining that the BIA's statutory interpretation deserved no *Chevron* deference because retroactivity neither implicates the BIA's expertise nor involves a congressional delegation of power to the BIA to fill a statutory silence. Pet. App. 20.

To determine whether Congress intended amended INA § 101(a)(13) to apply retroactively, the court applied the two-step test set forth in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). First, the court asked whether "Congress has expressly prescribed the statute's proper reach." *Id.* at 280. The government conceded, and the court agreed, that "Congress has not expressly prescribed the temporal reach of § 101(a)(13)." Pet. App. 20-21.

Because there is no explicit command, the court went on to decide *Landgraf*'s second step, namely whether applying the statute to this case would have a retroactive effect. The court of appeals held that § 101(a)(13) should be applied to Mr. Vartelas because, in the court's view, it would not interfere with his settled expectations. Pet. App. 21-22, 28. *St. Cyr*, in holding that the repeal of § 212(c) could apply only prospectively, had noted that immigrants had often relied on the possibility of discretionary relief under former § 212(c) when deciding whether to plead guilty to charges that would preserve the possibility of such relief. *Id.* at 22-24 (citing *St. Cyr*, 533 U.S. at 315, 321-24). Here, however, § 101(a)(13)(C)(v) refers to a lawful permanent resident who "has committed an offense" involving moral turpitude, rather than to one who has been convicted of such an offense. *Id.* at 25.

The court of appeals thus treated Mr. Vartelas's decision to plead guilty as immaterial. Reasoning that lawful permanent residents do not reasonably rely on the immigration laws in deciding whether to commit their offenses, the court held that the reliance interests that had informed this Court's decision in *St. Cyr* were inapplicable. AR 25-27. In so holding, the court below rejected Fourth and Ninth Circuit precedents to the contrary. *Id.* at 27-28 (declining to follow *Camins* v. *Gonzales*, 500 F.3d 872 (9th Cir. 2007) (W. Fletcher, J.), and *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004) (Luttig, J.)).

Based on its holding that § 101(a)(13)(C)(v) applies to lawful permanent residents guilty of

pre-IIRIRA offenses, the court held that Mr. Vartelas could not prove under any standard that he was prejudiced by his attorneys' failure to dispute retroactivity. Pet. App. 13, 28. Thus, the court denied his petition for review.

The court of appeals denied a timely petition for panel rehearing or rehearing en banc. Pet. App. 33.

SUMMARY OF ARGUMENT

Congress did not provide for INA § 101(a)(13)(C)(v) to apply retroactively to lawful permanent residents who committed offenses before IIRIRA's effective date. The government cannot bear its heavy burden of overcoming the presumption against retroactivity because IIRIRA does not satisfy either step of the *Landgraf* retroactivity test.

1. First, the statute contains no clear statement mandating retroactive application, as this Court recognized in *St. Cyr*. Indeed, the government conceded below the lack of a clear directive on retroactivity.

2. Second, the statute cannot satisfy *Landgraf*'s second step, which asks whether a statute would have a retroactive effect. If applied to lawful permanent residents whose conduct predated IIRIRA, its effect would be retroactive. IIRIRA's change in law would add a new penalty to pre-IIRIRA conduct by giving the government grounds to remove lawful permanent residents. It would disrupt their settled

expectations that returning from a brief trip would not amount to an entry that would trigger inadmissibility. Applying IIRIRA retroactively would thus "attach[ ] new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270.

IIRIRA's change in the law increases the substantive consequences of pre-IIRIRA conduct; it does not merely adjust prospective relief, jurisdiction, or procedure. It is no answer to say, as the government does, that lawful permanent residents can avoid removal by not traveling abroad. The restrictions that apply to present travel are a new disability imposed because of pre-IIRIRA conduct. Lawful permanent residents cannot avoid this new disability, which all but forbids lawful foreign travel on pain of removal. That disability, as well as the threatened penalty of removal based on pre-IIRIRA conduct, abridges the right to travel abroad.

3. The presumption against retroactivity is based on the general "unfairness of imposing new burdens on persons after the fact"; it does not require proof of reliance on the prior state of the law. *Landgraf*, 511 U.S. at 270. Nevertheless, as this Court recognized in *St. Cyr*, one can presume that lawful permanent residents in general relied on pre-IIRIRA law, which militates against giving the amendment retroactive effect.

Here too, applying the amended statute to lawful permanent residents would undermine their reasonable reliance on pre-IIRIRA law in deciding to plead guilty. Before IIRIRA, the *Fleuti* doctrine protected lawful permanent residents' right to make brief trips abroad without risk of being denied reentry upon return. If they had known that their right to travel under *Fleuti* would later be annulled by Congress on account of their pre-IIRIRA convictions, many lawful permanent residents would instead have chosen to go to trial or negotiated pleas to different charges.

Though § 101(a)(13)(C)(v) speaks in terms of the commission of an offense, and not the conviction, this distinction is immaterial. The consequences that IIRIRA attaches to the commission of certain offenses come into play only when a lawful permanent resident has been convicted of or admits to such offenses. Thus, the BIA correctly reads the scope of § 101(a)(13)(C)(v) as coextensive with § 212(a)(2)(A)(i)(I)'s requirement of a conviction. *Rivens*, 25 I. & N. Dec. at 626-27. In determining whether a lawful permanent resident is "seeking an admission" under the former subsection or is "inadmissible" under the latter subsection, the issue is the same: here, whether Mr. Vartelas has been convicted of or has admitted to a crime involving moral turpitude.

4. Finally, if any ambiguities remain, this Court should construe IIRIRA in favor of preserving lawful permanent residents' defense to removal. *St. Cyr*, 533 U.S. at 320. Thus, § 101(a)(13)(C)(v) should not apply

retroactively to lawful permanent residents' pre-IIRIRA conduct.

ARGUMENT

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. The laws of Ancient Greece and Rome as well as the Napoleonic Code embraced this precept, and Bracton, Blackstone, Chancellor Kent, and Justice Story affirmed its importance in the common law. *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855-56 (1990) (Scalia, J., concurring) (collecting historical sources); 1 WILLIAM BLACKSTONE, COMMENTARIES *46. As Justice Story stated, "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective" and impermissible. *Soc'y for the Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (Story, Circuit Justice, C.C.D.N.H. 1814) (No. 13,156).

This principle applies to civil as well as criminal cases as a strong rule of statutory construction. Indeed, *Society for the Propagation of the Gospel* was a civil case. As this Court recognized two centuries ago, "[w]ords in a statute ought not to have a retrospective operation, unless they are so clear, strong,

and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *United States* v. *Heth*, 7 U.S. (3 Cranch) 399, 413 (1806); *see also Chew Heong* v. *United States*, 112 U.S. 536, 559 (1884) ("[T]he courts uniformly refuse to give to statutes a retrospective operation. . . .") (immigration consequences of international treaty); James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 370, 403-09 (2010) (both "the Framers of the Constitution and the members of Congress who applied its terms in the early [Republic] were strongly committed to norms of prospectivity" that "rul[ed] out retrospective changes in [immigration] rules").

In *Landgraf*, this Court distilled the presumption against retroactivity into a two-step test of statutory construction. First, courts ask whether "Congress has expressly prescribed the statute's proper reach" by "express[ly] command[ing]" retroactive application. 511 U.S. at 280. Second, if there is no explicit command, courts must decide whether construing the law to apply to an event occurring before its enactment "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If so, courts must reject that construction as impermissibly retroactive.

Congress passed IIRIRA against the backdrop of *Landgraf*, which had been decided only two years

earlier. Here, IIRIRA fails both steps of the *Landgraf* test.

I. IIRIRA CONTAINS NO CLEAR STATEMENT MANDATING RETROACTIVE APPLICATION OF INA § 101(a)(13)(C)(v)

Subsection 101(a)(13)(C)(v) does not mandate its retroactive application to lawful permanent residents whose offenses predate IIRIRA. For a statute to apply retroactively, Congress must express its intent in an "unambiguous directive." *Landgraf*, 551 U.S. at 263. "The standard for finding such unambiguous direction is a demanding one," requiring "'statutory language that was so clear that it could sustain only one interpretation.'" *St. Cyr*, 533 U.S. at 316-17 (quoting *Lindh* v. *Murphy*, 521 U.S. 320, 328 n.4 (1997)). Only language of "unmistakable clarity" will suffice. *Id.* at 318.

No language in § 101(a)(13) even hints at, let alone clearly mandates, retroactive application to lawful permanent residents whose offenses predate IIRIRA. In the proceedings below, the government conceded this point and the court of appeals agreed. Pet. App. 20-21.

Furthermore, in *St. Cyr* this Court rejected the government's contention that IIRIRA as a whole clearly directs that all of its provisions should apply retroactively. 533 U.S. at 316-20. At the time of his pre-IIRIRA guilty plea to a deportable offense, Mr. St. Cyr would have been eligible for discretionary relief

under INA § 212(c). IIRIRA then repealed § 212(c) and purportedly eliminated his eligibility. *Id.* at 293. Applying *Landgraf*, this Court held that the repeal could not apply retroactively because Congress had not manifested a clear intent and because the repeal attached a new disability on account of his guilty plea. *Id.* at 315, 321. As this Court noted, Congress had explicitly made more than a dozen other provisions of IIRIRA retroactive (including another subsection of INA § 101(a)), indicating that it did not intend the remaining provisions to be retroactive as well. *Id.* at 319-20 & n.43; *e.g.*, IIRIRA § 321(b) (codified as amended at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43)) (specifying that IIRIRA's new definition of "aggravated felony" "applies regardless of whether the conviction was entered before, on, or after [September 30, 1996]"). Because § 101(a)(13), like the repeal of § 212(c), contains no mention of retroactivity, *St. Cyr*'s holding forecloses any such argument here.[3]

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[3] Indeed, IIRIRA's structure reflects Congress's clear intent *not* to make the provision retroactive. That intent is apparent from the interaction of § 101(a)(13)(C)(v) and the pre- and post-IIRIRA discretionary waiver provisions, which makes no sense if the statute is construed to apply retroactively. While § 101(a)(13)(C)(v) treats lawful permanent residents who have committed crimes involving moral turpitude as seeking admission, it excepts those who have received discretionary waivers under INA § 212(h) (8 U.S.C. § 1182(h)) or under a new provision enacted by IIRIRA, INA § 240A(a) (8 U.S.C. § 1229b(a)). But there is no exception for lawful permanent residents who received discretionary waivers under former INA § 212(c), the pre-IIRIRA predecessor to § 240A(a) that was at issue in *St. Cyr*.

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II. IF APPLIED TO OFFENSES OCCURRING BEFORE ITS ENACTMENT, INA § 101(a)(13)(C)(v) WOULD HAVE A RETROACTIVE EFFECT

IIRIRA cannot satisfy *Landgraf*'s second step either, because it "attaches new legal consequences to events completed before its enactment." 511 U.S. at 270. "Elementary considerations of fairness" counsel that new laws should not "lightly disrupt[ ]" "settled expectations." *Id.* at 265. Yet applying § 101(a)(13)(C)(v) to lawful permanent residents like Mr. Vartelas would threaten those settled expectations by imposing new legal consequences: many years after their offenses and guilty pleas, it would abrogate their *Fleuti* right to return after brief trips abroad or penalize them with removal if they did return. Those substantive changes establish that § 101(a)(13)(C)(v), if applied to Mr. Vartelas, would be retroactive.

Moreover, persons who have received former § 212(c) relief are categorically ineligible for § 240A(a) relief. INA § 240A(c)(6), 8 U.S.C. § 1229b(c)(6). Yet Congress cannot have intended to treat as immigrants seeking an admission all of the lawful permanent residents with past convictions who, before IIRIRA, had received § 212(c) relief, even though IIRIRA's definition of "seeking an admission" makes no exception for them. The only logical explanation for why Congress saw no need to include an exception for them is that IIRIRA eliminated former § 212(c) waivers for future offenses, and § 101(a)(13)(C)(v) was intended to apply only to post-IIRIRA offenses. Thus, § 101(a)(13)(C)(v) makes sense only as a prospective rule.

A. Applying IIRIRA to Lawful Permanent Residents Like Mr. Vartelas Would Have a Retroactive Effect

1. The principle of non-retroactivity "finds expression in several provisions of our Constitution," including the Contracts Clause, the Takings Clause, the Bill of Attainder Clauses, the Due Process Clauses, and the *Ex Post Facto* Clauses. *Landgraf*, 511 U.S. at 266; *see* U.S. Const. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1; *id.* amends. V, XIV § 1. All of "[t]hese [constitutional] provisions demonstrate that retroactive statutes raise particular concerns." *Landgraf*, 511 U.S. at 266.

"[T]he presumption against retroactivity applies far beyond the confines of the criminal law." *St. Cyr*, 533 U.S. at 324. Indeed, though "the constitutional prohibition on *ex post facto* laws applies only to penal statutes," the Court's test for retroactivity of civil statutes is "borrowed directly from [its] *Ex Post Facto* Clause jurisprudence." *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990) (penal limitation); *Landgraf*, 511 U.S. at 290 (Scalia, J., concurring) (citing *Miller* v. *Florida*, 482 U.S. 423, 430 (1987), an *Ex Post Facto* Clause case, as a source).[4] Thus, when adjudicating claims of civil retroactivity, this Court has repeatedly relied on *Ex Post Facto* Clause cases. *See*, *e.g.*, *St.*

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[4] One member of this Court has questioned "the soundness of this limitation" of the *ex post facto* bar to criminal cases. *E. Enters.* v. *Apfel*, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring).

Cyr, 533 U.S. at 325 (applying *ex post facto* case law to the retroactivity of IIRIRA); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 948 (1997) (same, for False Claims Act); *Landgraf*, 511 U.S. at 266-67 & n.20, 269 n.23, 275 n.28, 282 n.35, 285 n.37 (same, for Civil Rights Act of 1991). Where Congress has not spoken with unmistakable clarity in enacting a civil statute, "prospectivity remains the appropriate default rule." *Landgraf*, 511 U.S. at 272.

The overarching presumption that laws, whether criminal or civil, apply only prospectively is critical to protect people's settled expectations. "[C]entral to the *ex post facto* prohibition is a concern for 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" *Miller*, 482 U.S. at 430 (quoting *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981)). This same principle finds expression in civil cases, where "familiar considerations of fair notice, reasonable reliance, and settled expectations" guide retroactivity analysis. *Landgraf*, 511 U.S. at 270.

2. Here, § 101(a)(13)(C)(v) would add a new penalty to the pre-IIRIRA offenses of lawful permanent residents like Mr. Vartelas, by authorizing their removal upon their return from brief trips abroad.

If this were a criminal case, the ban on *ex post facto* laws would categorically forbid such new penalties. As this Court has long recognized, *ex post facto* laws include "[e]very law that changes the

punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.). A "central concern[ ] of the *Ex Post Facto* Clause" is to prevent "'legislature[s from] increas[ing] punishment beyond what was prescribed when the crime was consummated.'" *Lynce* v. *Mathis*, 519 U.S. 433, 441 (1997) (quoting *Weaver*, 450 U.S. at 30); *accord Miller*, 482 U.S. at 430.

Although it is not technically a criminal punishment, adding removal to the consequences of past criminal conduct likewise triggers retroactivity concerns. In deportation cases, "we do well to eschew technicalities and fictions and to deal instead with realities." *Costello* v. *INS*, 376 U.S. 120, 131 (1964). This Court "ha[s] long recognized that deportation is a particularly severe 'penalty.'" *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1481 (2010) (quoting *Fong Yue Ting* v. *United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting)); *accord Jordan* v. *De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) ("a savage penalty"). It may cause "loss of both property and life, or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). Because removal operates as a penalty, it cannot apply retroactively absent specific congressional authorization.

3. Whether it is labeled a penalty or not, retroactively authorizing removal "attaches new legal consequences" to a lawful permanent resident's pre-IIRIRA conduct and disrupts his settled expectations. *Landgraf*, 511 U.S. at 269-70. In *Landgraf*, this Court

considered whether the broader damages provisions enacted by the Civil Rights Act of 1991 could be applied to workplace discrimination that occurred before the Act's effective date. *Id.* at 249-50. Though the stakes were only dollars, not deportation, this Court declined to apply the change retroactively. *Id.* at 283. Courts must guard against laws that increase "[t]he *extent* of a party's liability, in the civil context as well as the criminal." *Id.* at 283-84 (emphasis in original). "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Id.* at 282 n.35; *see also Hughes Aircraft*, 520 U.S. at 948.

Likewise, making lawful permanent residents inadmissible upon their return from lawful trips abroad based on pre-IIRIRA conduct "clearly '"attaches a new disability, in respect to transactions or considerations already past."'" *St. Cyr*, 533 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 269, which in turn quoted *Society for the Propagation of the Gospel*, 22 F. Cas. at 767 (Story, J.)). Until IIRIRA, lawful permanent residents enjoyed the right to take and return from brief trips abroad. If applied retroactively, IIRIRA would abridge that right based on a long-ago, pre-IIRIRA offense. Because Mr. Vartelas took a brief trip to help his elderly parents in Greece, he now faces "the equivalent of banishment or exile" from the United States, where his wife and children live and

which he has called home for more than thirty years. *Fong Haw Tam* v. *Phelan*, 333 U.S. 6, 10 (1948).

4. The repeal of the *Fleuti* defense is especially disfavored under both this Court's retroactivity and *Ex Post Facto* Clause jurisprudence. Under *Fleuti*, the government could not exclude a lawful permanent resident or detain him as an arriving alien unless it could prove that his trips abroad were not "innocent, casual, and brief" and so were "meaningfully interruptive of [his] permanent residence." 374 U.S. at 462; *Plasencia*, 459 U.S. at 28-29; *see* INA § 235(b), 8 U.S.C. § 1225(b) (1994). Applying § 101(a)(13)(C)(v) retroactively would thus prevent lawful permanent residents like Mr. Vartelas from asserting their *Fleuti* defense in their removal proceedings.

Again, if this were a criminal case, the ban on *ex post facto* laws would flatly forbid abolishing such defenses. "A law that abolishes an affirmative defense . . . contravenes [the *Ex Post Facto* Clause], because it expands the scope of a criminal prohibition after the act is done." *Collins*, 497 U.S. at 49. The same principle applies in the civil context as a strong rule of statutory construction. In *Hughes Aircraft*, the False Claims Act had previously barred *qui tam* suits filed by private parties based on information already possessed by the government. 520 U.S. at 941. An amendment removed that bar, but this Court held that the amendment could not apply retroactively to conduct completed before it took effect. *Id.* at 941-42. The amendment, the Court stressed, "eliminates a defense to a *qui tam* suit." *Id.* at 948. Even though it

did not increase the dollar amount of liability, the amendment nonetheless "'"attach[ed] a new disability"'" based on the prior act, by exposing the company to lawsuits brought by more and different parties. *Id.* (quoting *Landgraf*, 511 U.S. at 269, which in turn quoted *Society for the Propagation of the Gospel*, 22 F. Cas. at 767 (Story, J.)).

Here, as in *Hughes Aircraft*, lawful permanent residents must remain able to raise any defense to removal that existed before IIRIRA, when they committed their offenses and pleaded guilty. Before IIRIRA, lawful permanent residents returning to the country could defend against removal by showing that their trips were not "meaningfully interruptive of [their] permanent residence." *Fleuti*, 374 U.S. at 462. Depriving them of that defense would attach a new disability to them based on their pre-IIRIRA offenses.[5]

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[5] Although Mr. Vartelas's *Fleuti* defense could in theory fail on remand, that possibility does not affect the retroactivity analysis. *See St. Cyr*, 533 U.S. at 325 ("There is a clear difference, for the purposes of retroactivity analysis, between facing *possible* deportation and facing *certain* deportation" (citing *Hughes Aircraft*, 520 U.S. at 949) (emphasis added)).

In any event, Mr. Vartelas's trip was innocent: he traveled to Greece to help his elderly parents with their family business. It was casual: no visa or similar paperwork was required for the trip. *See Fleuti*, 374 U.S. at 462. And it was brief: just one week long. Though the trip in *Fleuti* itself lasted only a few hours, courts have found trips of weeks or even months to be brief enough. *See, e.g.*, *Jubilado* v. *United States*, 819 F.2d 210, 213 (9th Cir. 1987) (three-month trip to bring family to the United

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B. Applying IIRIRA to Lawful Permanent Residents Like Mr. Vartelas Would Change Their Substantive Rights

None of the exceptions to the rule against retroactivity applies to this case. *Landgraf* identified three such exceptions: for statutes that authorize prospective relief or regulate jurisdiction or procedure. *See* 511 U.S. at 273-75.

Under *Fleuti*, Mr. Vartelas's return from his one-week trip did not amount to an entry under pre-IIRIRA law, so he was free to return. Under the court of appeals' decision, however, he would be regarded as "seeking an admission" under § 101(a)(13)(C)(v) and in fact would be inadmissible under § 212(a)(2)(A)(i)(I). That change imposes a substantive disability on Mr. Vartelas, preventing him from traveling abroad and returning, on pain of removal.

Abrogating the *Fleuti* doctrine is nothing like providing new prospective relief such as declaratory

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States); *Kamheangpatiyooth* v. *INS*, 597 F.2d 1253, 1255, 1258 (9th Cir. 1979) (one-month trip to visit dying mother); *Itzcovitz* v. *Selective Serv. Local Bd. No. 6*, 447 F.2d 888, 889, 893-94 (2d Cir. 1971) (three-week trip for job training). A trip lasting a week, a month, or even longer may be considered brief, depending on the circumstances, as long as it is not "meaningfully interruptive of the alien's permanent residence." *Fleuti*, 374 U.S. at 462.

In short, Mr. Vartelas should be able to litigate this colorable issue on remand, as Mr. Fleuti did. *See Fleuti*, 374 U.S. at 463 (vacating and remanding for factual development).

or injunctive relief. In *St. Cyr*, this Court rejected the government's argument that deportation was "inherently prospective" because it concerned an immigrant's "right to remain in this country in the future." 533 U.S. at 324 (internal quotation marks omitted); *see id.* at 324 n.53. That holding governs here as well.

Nor is § 101(a)(13)(C)(v) a jurisdictional statute, *see Hughes Aircraft*, 520 U.S. at 950-51, or a purely procedural change. This Court has excepted purely procedural changes from the non-retroactivity presumption because they "regulate secondary rather than primary conduct." *Landgraf*, 511 U.S. at 275. Committing an offense is primary conduct.[6] The change here affects lawful permanent residents' substantive rights.

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[6] Even procedural changes can have impermissible substantive effects. "[S]imply labeling a law 'procedural' . . . does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause"; "a procedural change may constitute an *ex post facto* violation if it 'affect[s] matters of substance.'" *Collins*, 497 U.S. at 45-46 (quoting *Beazell* v. *Ohio*, 269 U.S. 167, 171 (1925)); *accord Weaver*, 450 U.S. at 29 n.12 ("Alteration of a substantial right . . . is not merely procedural, even if the statute takes a seemingly procedural form."); *see, e.g.*, *Lindh*, 521 U.S. at 327 (noting that, under *Landgraf*, "change[s to] standards of proof and persuasion . . . go[ ] beyond 'mere' procedure to affect substantive entitlement to relief").

C. The Disability and Penalty Imposed by IIRIRA Are Based on Pre-IIRIRA Conduct, Not Post-IIRIRA Travel

1. In opposing certiorari, the government argued that applying § 101(a)(13)(C)(v) to Mr. Vartelas would not be retroactive because his trip abroad occurred in 2003, years after IIRIRA's 1997 effective date, and constituted a "determinative event for retroactivity analysis." BIO 12. The government argued that Mr. Vartelas "could have avoided the application of the statute. . . . [by] refrain[ing] from departing from the United States (or from returning to the United States)." BIO 13. These contentions misconceive the nature of the rights abridged by the statute as a result of past conduct, namely the right to return after brief trips abroad and the corresponding right not to be penalized for that travel based on pre-IIRIRA conduct.

Retroactivity analysis "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-58 (1999) (quoting *Landgraf*, 511 U.S. at 270). Here, as a "commonsense, functional" matter, IIRIRA unquestionably attaches "new legal consequences" to lawful permanent residents' pre-IIRIRA offenses. When Mr. Vartelas committed the offense, and when he pleaded guilty, he had no notice that any travel abroad in the future, no matter how brief, would jeopardize his lawful permanent resident status. In other words, he retained the right, under

Fleuti, to continue to make and return from brief trips abroad. Years later, IIRIRA added a new, retroactive consequence to his pre-IIRIRA conviction by abridging his right to travel abroad. This new disability attached at the time of IIRIRA's enactment but is based on past, pre-IIRIRA conduct that he cannot undo.

It is thus no answer to say, as the government does, that Mr. Vartelas could have refrained from traveling abroad. BIO 13. True, a lawful permanent resident who stays in the United States can avoid making an entry that could trigger inadmissibility and removal. But the right to make such trips without risking removal was among the rights Mr. Vartelas preserved when he pleaded guilty before IIRIRA. For Mr. Vartelas, like many in his situation, not traveling would mean forever surrendering the right to see and help his elderly parents, lest he jeopardize his lawful permanent resident status. Applying IIRIRA to Mr. Vartelas both imposes a disability on him by abridging his right to travel and adds a new penalty – the risk of removal – based on his pre-IIRIRA conduct. *See Olatunji*, 387 F.3d at 392, 398.

The retroactive repeal of *Fleuti* would indisputably "attach[] new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. That is the correct legal test, and the inquiry should end there.

2. Not only does applying the statute to lawful permanent residents who committed pre-IIRIRA offenses have clear retroactive effect under *Landgraf*, but it also satisfies the standard advocated by Justice Scalia in his concurrence in *Martin*. Justice Scalia opined that "the decision of which reference point (which 'retroactivity event') to select should turn upon which activity the statute was intended to regulate." *Martin*, 527 U.S. at 363 (Scalia, J., concurring in part and concurring in the judgment). That inquiry should focus "not on the subjective motivation of the legislature in enacting the [provision], but rather on whether objectively the new statute. . . . had the effect of" adding a new consequence to pre-IIRIRA activity. *Lynce*, 519 U.S. at 442-43 (1997) (citing *Weaver*, 450 U.S. at 33) (*ex post facto* decision). For example, a law restricting future good-time sentence reductions is *ex post facto* if applied to sentences for offenses committed before its enactment. *Weaver*, 450 U.S. at 32-33. Though in form the good-time-credits law in *Weaver* applied only after its effective date, in substance it increased the consequences imposed on account of prior offenses. *Id.* at 31. Here too, the statute imposes a new disability and penalty on Mr. Vartelas based on his pre-IIRIRA offense, not based on his innocent post-IIRIRA travel.

Subsection 101(a)(13) enumerates six criteria that require returning lawful permanent residents to be treated as seeking an admission. Three of the six criteria involve some form of earlier misconduct, namely abandonment of one's lawful permanent

resident status, departure while in removal or extradition proceedings, or commission of a crime involving moral turpitude or the like. INA § 101(a)(13)(C)(i), (iv), (v), 8 U.S.C. § 1101(a)(13)(C)(i), (iv), (v).[7] Absent these factors, a lawful permanent resident may travel abroad without being treated as seeking an admission upon his return. The statute does not make foreign travel unlawful. Even if the travel serves as an occasion for screening, as the government suggests (BIO 11-12), the penalty of inadmissibility flows from impermissible past conduct. Historically, this Court has understood deportation triggered by a criminal conviction as a "penalty," "the forfeiture for misconduct of a [lawful permanent resident's] residence in this country." *Fong Haw Tan*, 333 U.S. at 10.[8] That is how it operates here.

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[7] Two other criteria involve present misconduct, namely illegal activity while abroad or trying to enter at an unauthorized place or time. INA § 101(a)(13)(C)(iii), (vi), 8 U.S.C. § 1101(a)(13)(C)(iii), (vi). Only one of the six criteria is apparently innocent: an absence of more than 180 days, though that absence might amount to abandonment of one's lawful permanent resident status. INA § 101(a)(13)(C)(ii), 8 U.S.C. § 1101(a)(13)(C)(ii).

[8] That understanding of § 101(a)(13)(C)(v) as a penalty for past misconduct fits IIRIRA's title, which targets "Immigrant Responsibility" for misconduct rather than travel by lawful permanent residents. It also fits other provisions of IIRIRA, such as those broadening the category of aggravated felonies and abolishing or limiting relief for many immigrants convicted of crimes. *See, e.g.*, IIRIRA § 321(a) (broadening the definition of an aggravated felony); *id.* § 304 (repealing INA § 212(c) and making aggravated felons ineligible for cancellation of removal);

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In addition, the effect of § 101(a)(13)(C)(v) is not only to penalize past misbehavior, but also to provide incentives to keep lawful permanent residents on good behavior. After IIRIRA, lawful permanent residents have notice that committing even minor offenses involving moral turpitude can result not only in imprisonment but also in a permanent bar to travel on pain of becoming removable. While minor offenses might carry only brief jail terms and thus provide limited deterrence, the prospect of removal would make many lawful permanent residents hypervigilant about obeying the law. The abrogation of *Fleuti* thus adds a weighty deterrent to committing such offenses. *Cf. Landgraf*, 511 U.S. at 282 & n.35 (noting that the availability of damages would change managers' conduct and help to prevent discrimination). But deterrence can operate only prospectively, after IIRIRA has given notice of the removal penalty. It would be nonsensical to read IIRIRA as seeking to deter past misconduct. *See id.* at 282 n.35.

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id. §§ 326-329, 332 (authorizing systems for identifying and tracking criminal aliens, appropriating funds to cover states' expenses of incarcerating criminal aliens, and requiring annual reporting on the numbers of illegal aliens convicted and incarcerated for various offenses); *id.* §§ 330-331 (addressing treaties governing transfers of immigrant prisoners to other countries). Likewise, upon signing IIRIRA into law, President Clinton stressed that it "crack[s] down on illegal immigration . . . in the criminal justice system – without punishing those living in the United States legally." Statement of the President on Signing Budget and Immigration Bill, 1996 WL 555150, at *2 (Sept. 30, 1996).

3. This is not a case in which the change in law prospectively targets a current or ongoing crime, as was the case in *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006). After his deportation and several illegal reentries, Fernandez-Vargas unlawfully remained in the United States for more than two decades, undetected by immigration authorities until 2003. *Id.* at 35. As an illegal alien, he was deportable at any time. This Court found no retroactive effect in applying IIRIRA to an illegal alien like Fernandez-Vargas who had illegally reentered before IIRIRA and illegally remained after its effective date. It noted that retroactivity analysis is "meant to avoid new burdens imposed on completed acts." *Id.* at 46. The statute in that case targeted the "indefinitely continuing violation" of "cho[osing] to continue his illegal presence, after illegal reentry and after the effective date of the new law . . . not a past act that he is helpless to undo." *Id.* at 44. "Fernandez-Vargas continued to violate the law by remaining in this country day after day, and . . . the United States was entitled to bring that continuing violation to an end." *Id.* at 46 n.13.

Here, by contrast, there is no ongoing or post-IIRIRA crime. Mr. Vartelas's only offense occurred and was resolved before IIRIRA: he pleaded guilty to it, capped his liability, and paid his debt to society. He is not an illegal alien whose very presence is an ongoing crime justifying removal. He is a lawful permanent resident and has always been in this country lawfully. Likewise, his brief trips to help his

parents in Greece are entirely lawful, and he wants to continue to make these trips. But for his 1994 conviction, those trips themselves would not subject him to the possibility of removal. The inadmissibility triggered by his lawful trips is thus a pure retroactive penalty for conduct completed before IIRIRA.

In short, by amending the INA to add § 101(a)(13)(C)(v), Congress attached a new disability and a new penalty to crimes involving moral turpitude. Congress expressed no clear intent, however, to apply that new penalty and disability retroactively to past offenses or convictions.

III. IIRIRA IS IMPERMISSIBLY RETROACTIVE REGARDLESS OF RELIANCE, BUT RELIANCE BY THOSE WHO PLEADED GUILTY UNDER PRE-IIRIRA LAW ESTABLISHES AN ESPECIALLY OBVIOUS AND SEVERE RETROACTIVE EFFECT

The presumption against retroactivity is grounded in "the unfairness of imposing new burdens on persons after the fact," rather than on any reliance by those affected by a change in the law. *Landgraf*, 511 U.S. at 270. The court of appeals therefore erred in ruling that reliance was a prerequisite for impermissible retroactivity. Even if the court were right to require reliance, however, it also erred by ignoring the substantial reliance on existing law by lawful permanent residents who pleaded guilty. That reliance makes the statute's retroactive effect all the more severe.

A. Reliance on Pre-Existing Law Is Not Necessary for a New Law to Have a Retroactive Effect

1. In *Landgraf*, this Court noted that while the Civil Rights Act of 1991 authorized previously unavailable civil damages for employment discrimination, the discrimination itself had been illegal for decades. 511 U.S. at 282 & n.35. Thus, it acknowledged, "concerns of unfair surprise and upsetting expectations" upon applying the new law would be "attenuated." *Id.* But that lack of reliance by employers was of no consequence. As the Court explained, "[e]ven when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Id.* (citing *Weaver*'s interpretation of the *Ex Post Facto* Clause, 450 U.S. at 28-30). *Landgraf*'s decision turned not on any showing of reliance, but on "whether the new provision attache[d] new legal consequences to events completed before its enactment." *Id.* at 269-70.

Likewise, in *Hughes Aircraft*, this Court noted that "impermissible retroactivity" takes "various formulations," and no particular kind of harm is a "necessary condition" for finding retroactivity. 520 U.S. at 947 (emphasis and comma omitted). As in *Landgraf*, the Court focused on additional burdens: whether applying the law retroactively "'"attach[ed] a new disability, in respect to transactions or considerations already past."'" *Id.* at 948 (quoting

Landgraf, 511 U.S. at 269, which in turn quoted *Society for the Propagation of the Gospel*, 22 F. Cas. at 767 (Story, J.)). And, as Judge Luttig observed in a case presenting the same issue as this one, this Court did so without "a single word of discussion as to whether Hughes Aircraft – or, for that matter, similarly situated government contractors – had relied on the eliminated defense to its detriment." *Olatunji*, 387 F.3d at 391 (emphasis omitted). *Hughes Aircraft*, like *Landgraf*, never mentioned reliance as a prerequisite for a retroactivity claim. As in *Landgraf*, Hughes Aircraft's actions in submitting false claims to the government had long been illegal, so it could not have relied on a right to violate the law. But the lack of reliance was immaterial.

In *St. Cyr*, this Court treated reliance as just one of several factors that inform the retroactivity inquiry. *See* 533 U.S. at 321 n.46. *St. Cyr* held that discretionary relief from deportation under former INA § 212(c) remained available to a lawful permanent resident who had pleaded guilty before IIRIRA to a crime that would later bar that relief under IIRIRA. *Id.* at 293, 326. The Court considered the case of another lawful permanent resident, Charles Jideonwo, who had expressly relied on the availability of § 212(c) relief. *Id.* at 323. *St. Cyr* found Mr. Jideonwo's case "instructive" as to the frequency with which "a great number of defendants in Jideonwo's and St. Cyr's position agreed to plead guilty." *Id.* at 323.

Under *St. Cyr*, reliance on the old law, while sufficient to establish an "obvious and severe retroactive effect," is not necessary to show impermissible retroactivity. 533 U.S. at 325; *see Olatunji*, 387 F.3d at 389, 393. *St. Cyr* reiterated Justice Story's enduring rule that a "statute has retroactive effect when it '"takes away or impairs vested rights acquired under existing laws . . . *or* attaches a new disability, in respect to transactions or considerations already past."'" *St. Cyr*, 533 U.S. at 321 (emphasis added) (quoting *Landgraf*, 511 U.S. at 269, which in turn quoted *Soc'y for the Propagation of the Gospel*, 22 F. Cas. at 767 (Story, J.)). As *St. Cyr* explained, Justice Story's formulation "describes several '*sufficient*,' as opposed to '*necessary*,' conditions for finding retroactivity." *Id.* at 321 n.46 (emphases in original) (quoting *Hughes Aircraft*, 520 U.S. at 947); *see also Fernandez-Vargas*, 548 U.S. at 44 n.10 (treating Justice Story's vested-rights category as distinct from his category of laws imposing "new consequences [on] past acts"). *St. Cyr* did not add a new reliance requirement to Justice Story's classic formulation or to the holdings of *Landgraf* or *Hughes Aircraft*. Whether or not one can prove reliance, a new disability based on past conduct violates the presumption against retroactivity.

2. Finally, a reliance requirement would not square with the presumption that Congress intends its laws to operate only prospectively. "It is a strange 'presumption,' in our view, that arises only on so heightened a showing as actual reliance "

Ponnapula v. *Ashcroft*, 373 F.3d 480, 491 (3d Cir. 2004) (Becker, J.). "[W]here Congress has apparently given no thought to the question of retroactivity whatever, there is no basis for inferring that Congress' intent was any more nuanced than that statutes should not be held to apply retroactively. Anything more, in the face of complete congressional silence, is nothing but judicial legislation." *Olatunji*, 387 F.3d at 394.

Thus, no proof of reliance is necessary. It is enough that IIRIRA attaches an additional consequence to pre-IIRIRA offenses. The court of appeals erred in concluding otherwise.

B. In Any Event, Applying IIRIRA Retroactively Would Upset Lawful Permanent Residents' Reasonable Reliance on the *Fleuti* Doctrine in Pleading Guilty

1. Lawful Permanent Residents Reasonably Relied upon the *Fleuti* Doctrine in Deciding Whether to Plead Guilty

Even though reasonable reliance on the prior statutory scheme is not necessary to show impermissible retroactivity, this Court may take such reliance into account, as it did in *St. Cyr*. *See* 533 U.S. at 324; *see also Landgraf*, 511 U.S. at 270. When pleading guilty, many lawful permanent residents like Mr. Vartelas have reasonably relied on the known

immigration consequences of a plea. Until 1997, one of the most important consequences would have been their continued ability to travel abroad under *Fleuti*. Applying the new statute to those with pre-IIRIRA offenses would violate that reliance. For the reasons given above, applying the new § 101(a)(13)(C)(v) would be retroactive, and thus impermissible, regardless of reliance. In addition to those reasons, lawful permanent residents' reliance makes the retroactivity especially "obvious and severe." *St. Cyr*, 533 U.S. at 325.

A statute is retroactive if it upsets the expectations of lawful permanent residents who relied on the existing state of the law when they agreed to plead guilty. *St. Cyr*, 533 U.S. at 321. "Plea agreements involve a *quid pro quo* between a criminal defendant and the government." *Id.* In exchange for surrendering their constitutional rights and conserving prosecutorial resources, defendants expect various assurances, including assurances regarding any possible effect on their immigration status and rights. *See id.* at 322-23. "There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *Id.* at 322 (quoted in *Padilla*, 130 S. Ct. at 1481-82). Indeed, "[p]reserving [their] right to remain in the United States may be more important to [them] than any potential jail sentence."

Id. at 322 (quoted in *Padilla*, 130 S. Ct. at 1483) (internal quotation marks omitted).

Thus, in *St. Cyr*, preserving the possibility of discretionary relief "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." 533 U.S. at 323. Once prosecutors have benefitted from immigrants' guilty pleas, applying IIRIRA retroactively to those immigrants "would surely be contrary to 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id.* at 323-24 (quoting *Landgraf*, 511 U.S. at 270).

The same is true here. Lawful permanent residents like Mr. Vartelas reasonably relied on the state of the immigration law at the time of their pleas. *St. Cyr*, 533 U.S. at 322, 325 n.55 (citing *Chew Heong*, 112 U.S. at 559). By pleading guilty to a crime involving moral turpitude, those lawful permanent residents gave up the chance of acquittal or a lesser conviction in exchange for "some perceived benefit" – namely, a shorter prison term and known immigration consequences of their pleas. *Id.* at 322. Lawful permanent residents like Mr. Vartelas were on notice that pleading guilty to a crime involving moral turpitude would impede taking extended trips abroad. But he and similarly situated lawful permanent residents relied on their continuing right under *Fleuti* to make brief trips abroad, to help their families or for other

innocent purposes.[9] This reliance on *Fleuti* was eminently reasonable, "[f]or it would seem never to be unreasonable for one to rely upon a duly enacted or promulgated law." *Olatunji*, 387 F.3d at 396.

Even though they have made their permanent homes here, lawful permanent residents consider their right to travel abroad to be of paramount importance. Many must make brief trips abroad to visit loved ones, care for sick relatives, tend to business, and attend weddings and funerals. *See* Nancy Morawetz, *The Invisible Border: Restrictions on Short-Term Travel by Noncitizens*, 21 GEO. IMMIGR. L.J. 201, 223-26 (2007). Particularly because lawful permanent residents cannot petition to bring their parents here permanently, many have no choice but to return home to tend to those who are too old or ill to travel. *See id.* at 203 & n.4, 223. The right to travel abroad is thus precisely the kind of consideration that lawful permanent residents "are acutely aware of" in deciding whether to plead guilty. *St. Cyr*, 533 U.S. at 322.

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[9] Indeed, at oral argument before this Court in another case, the government contended that a lawful permanent resident would have relied on *Fleuti*'s continued existence for another consideration, namely whether he had made an entry within five years before his guilty plea and thus would be ineligible for discretionary relief under former INA § 212(c). Transcript of Oral Argument at 38, *Judulang* v. *Holder*, No. 10-694 (U.S. Oct. 12, 2011).

Had they known that their guilty pleas would later foreclose *all* travel outside the United States, many lawful permanent residents likely would not have agreed to plead guilty. They might have insisted on trials or negotiated pleas to offenses not involving moral turpitude or to ones that would qualify for the petty-offense exception. *See* INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (exempting offenses for which the maximum sentence is one year or less and the actual sentence imposed is six months or less).[10]

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[10] It is no answer to suggest that Mr. Vartelas should have applied for discretionary relief under former INA § 212(c) before his brief trip to Greece in 2003. BIO 13. Relief under that provision is granted only as a matter of discretion. It is not guaranteed and therefore is not the same as the right to travel that Mr. Vartelas previously enjoyed under *Fleuti*. *Cf. St. Cyr*, 533 U.S. at 325 (stressing the "clear difference . . . between facing possible deportation and facing certain deportation"). In fact, when Mr. Vartelas applied for relief under former § 212(c) during his removal proceedings, his claim was denied. AR 116.

In any event, there was no reason why Mr. Vartelas would have thought he needed to apply for such relief. This Court's precedents in *Landgraf* and *St. Cyr* indicated that § 101(a)(13)(C)(v) could not apply retroactively to his pre-IIRIRA offense to deprive him of the protection of the *Fleuti* doctrine.

Finally, Mr. Vartelas might not have known to be attentive to changes in immigration law following his plea. While ignorance of the law is generally no excuse, Mr. Vartelas did not and is not accused of violating the law after IIRIRA. Moreover, expecting ordinary people to follow changes in the law becomes unfair when dealing with "highly technical statutes that present[ ] the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan* v. *United States*, 524 U.S. 184, 194 (1998); *see also Padilla*, 130 S. Ct. at 1490 (Alito, J., concurring in the judgment) (expressing concern about requiring attorneys

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Applying the new statute to unsettle that kind of reliance interest would be a particularly onerous and unwarranted retroactive change. In the absence of a clear congressional intent to do so, it should be rejected.

2. The Court of Appeals Erred in Dismissing Lawful Permanent Residents' Reliance Interests

1. The decision below erroneously concluded that any reliance on existing law by those in Mr. Vartelas's position, at the time they pleaded guilty, is irrelevant. In distinguishing this case from *St. Cyr*, the court of appeals focused on a linguistic difference between § 101(a)(13)(C)(v), at issue here, and former § 212(c), at issue in *St. Cyr*. Subsection § 101(a)(13)(C)(v) provides that anyone who "has committed an offense identified in section 1182(a)(2)," INA § 212(a)(2), which includes a crime involving moral turpitude, is generally regarded as "seeking an admission." INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v). Under § 101(a)(13)(C)(v), the court stated, a lawful permanent resident must generally be "regarded as seeking

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to provide immigration advice because "nothing is ever simple with immigration law") (internal quotation marks omitted). Here, Mr. Vartelas's conduct was not just "apparently" innocent – it was a lawful trip abroad by a lawful permanent resident. To suggest that he should have taken remedial steps before traveling creates a novel burden to determine, *ex ante*, whether a perfectly lawful act will trigger new penalties for old, already-penalized conduct.

an admission" if he "has committed [a specified] offense," rather than if he has been convicted or pleaded guilty. *Id.*; Pet. App. 17, 24-25. By contrast, the court of appeals interpreted former § 212(c) as permitting discretionary relief for those "convicted" of offenses and not simply those who committed offenses. Pet. App. 24-25. (The operative sentence of former § 212(c), however, uses neither term.) As a result, the court held that reliance interests should be assessed as of the time the lawful permanent resident committed the offense, not when he decided to plead guilty. *Id.* On that basis, the court of appeals concluded that lawful permanent residents' reliance on pre-IIRIRA law in pleading guilty is of no consequence here. Pet. App. 27-28.

Based on that proposition, the court of appeals attempted to distinguish *St. Cyr*. The court believed that former § 212(c)'s supposed dependence on the fact of conviction underpinned this Court's consideration of Mr. St. Cyr's reliance interest in pleading guilty. *Id.* The court stated that one cannot reasonably rely on the continued availability of an immigration benefit in deciding to commit a criminal offense, *id.* at 25, even though the *ex post facto* bar forbids increasing the penalties imposed upon past offenses. *Cf. Apprendi* v. *New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (advocating the fairness of a system in which "the criminal will never get *more* punishment than he bargained for when he did the crime") (emphasis in original); *Landgraf*, 511 U.S. at 282 n.35 (noting that managers are expected to

change their behavior in response to monetary penalties, which may deter discrimination).

2. Even if the court of appeals were theoretically correct in rejecting reliance interests at the time of the commission of an offense, its decision would founder as a practical matter. In the real world, the commission of an offense by itself generally will not trigger immigration consequences unless the lawful permanent resident has been convicted of it. Unless the lawful permanent resident admits every factual element of guilt, the government will be able to prove the commission of an offense only by virtue of some formal judicial finding, usually by guilty plea or occasionally by conviction at trial. *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbls. 5.24.2010, 5.46.2006, http://www.albany.edu/sourcebook/tost_5.html (last visited Nov. 11, 2011) (97% of federal convictions in 2010, as well as 94% of state felony convictions in 2006, were by guilty plea); *In re E– N–*, 7 I. & N. Dec. 153, 153 (BIA 1956) (no "valid admission" to statutory rape where an "admission as to the age of the girl involved" was lacking).

In other words, the commission of an offense usually matters in practice only because it results in a conviction. Congress is presumably aware that most criminal defendants plead guilty. When Congress enacted IIRIRA, it was thus on notice that the reliance interests at stake would generally be those of lawful permanent residents who were considering the immigration consequences of pleading guilty. These

reliance interests existed regardless of whether particular provisions of IIRIRA were tied to the commission or the conviction of an offense.

3. In order to defend the court of appeals' distinction, the government suggests that those seeking an admission under § 101(a)(13)(C)(v) constitute a broader category than those inadmissible under § 212(a)(2). BIO 11-12. The government contends that Congress meant to cast a broader net to examine a universe of potentially inadmissible lawful permanent residents, even though only a subset of them will ultimately prove inadmissible. *Id.* Thus, the government posits, seeking an admission under § 101(a)(13)(C)(v) should not be read as narrowly as inadmissibility under § 212(a)(2)(A)(i)(I), which requires a conviction and not just commission of a crime involving moral turpitude. *Id.*

The BIA, however, rejects the government's interpretation. It reads § 101(a)(13)(C)(v) as coextensive with § 212(a)(2), which the former subsection cross-references. In *Rivens*, the BIA considered who bears the burden of proving that a lawful permanent resident is seeking an admission under § 101(a)(13)(C)(v). 25 I. & N. Dec. at 625-26. It held that the government bears the burden of proof on that point by clear and convincing evidence. *Id.* The BIA concluded that it need not decide which party bears the burden of proving inadmissibility under § 212(a)(2)(A)(i)(I) for a crime involving moral turpitude, noting that the findings for the two provisions are identical. *Id.* at 626-27. In other words, if a lawful

permanent resident is seeking an admission under § 101(a)(13)(C)(v), he is also inadmissible under § 212(a)(2). *Id.*

As the three-judge panel of the BIA explained: "The exception to the general rule in section 101(a)(13)(C) . . . , namely, the commission of an offense identified in section 212(a)(2), *coincides with* the ground of inadmissibility . . . , that is, a conviction for a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the [INA]." *Rivens*, 25 I. & N. Dec. at 626-27 (emphasis added). "Thus," the BIA stated, "if the [government] establishes that the respondent is an applicant for admission under section 101(a)(13)(C)(v) of the [INA], it will have de facto established the respondent's inadmissibility." *Id.* at 627.

Because the BIA exercises discretion delegated to it by the Attorney General, the designated enforcer of the INA, the BIA's decision in *Rivens* is entitled to *Chevron* deference. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999); *see also INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987). As the BIA recognized, the two sections governing seeking an admission and inadmissibility "coincide[]": there is no gap between the two, as both are triggered by a conviction for a crime involving moral turpitude. In this context, seeking an admission under § 101(a)(13)(C)(v) can be triggered only when an immigrant is inadmissible under § 212(a)(2)(A)(i)(I). The latter section and thus the former section require a conviction or an admission of guilt, not just commission of an offense.

4. The government's interpretation to the contrary would lead to absurd results. It would indeed create a gap between those seeking an admission and those who are inadmissible – except that in many cases, that gap would make the group of aliens seeking admission *smaller* than the group who could be found inadmissible.

INA § 212(a)(2) renders inadmissible any immigrant who falls within enumerated categories of criminal and related grounds. Some of its subsections require convictions or admissions of certain crimes, such as § 212(a)(2)(A)(i) (convictions for crimes involving moral turpitude).[11] Other subsections require lower standards and different kinds of proof, such as "know[ledge] or . . . reason to believe [the immigrant] is or has been an illicit [drug] trafficker." INA § 212(a)(2)(C)(i), 8 U.S.C. § 1182(a)(2)(C)(i); *see also* INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D) (persons coming to engage in prostitution or commercialized vice). Still other subsections require only secondary association with a crime, such as being a known drug trafficker's spouse or child who knew or should have known that the spouse or child derived any benefit

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[11] Some of its subsections require not only convictions but also certain sentences. *E.g.*, INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii) (petty-offense exception for convictions with maximum sentences of no more than one year and actual sentences imposed of no more than six months); INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B) (multiple convictions with sentences totaling five years or more).

from the trafficking. INA § 212(a)(2)(C)(ii), 8 U.S.C. § 1182(a)(2)(C)(ii).

Yet under the government's and court of appeals' interpretation, drug traffickers and their families might qualify as not seeking an admission in the first place, even though their conduct falls within § 212(a)(2)(C). Known traffickers and their families would fall into a gap between the two sections: although they are inadmissible under § 212(a)(2)(C) simply for being known traffickers or their family members, they would not be seeking an admission under § 101(a)(13)(C)(v) unless the government could prove that they had committed an offense. In the case of known traffickers, that would sometimes be difficult; in the case of their family members, it would often be impossible. These aliens would be inadmissible, but to no avail, because they would not be deemed to be seeking an admission in the first instance.

Given the specificity of the proof required by § 212(a)(2), the two provisions must be read to "coincide[]." *Rivens*, 25 I. & N. Dec. at 627. That is, § 101(a)(13)(C)(v) refers to commission of an offense only to cross-reference the specific proof of commission required by § 212(a)(2), such as conviction of a crime involving moral turpitude. Any of the kinds of acts and proof specified in § 212(a)(2), such as being a known drug trafficker or a family member of a known trafficker, would equally amount to commission within the meaning of § 101(a)(13)(C)(v). Here, in short, a conviction of or admission to a crime

involving moral turpitude is the operative event for § 101(a)(13)(C)(v).

IV. ANY LINGERING AMBIGUITIES SHOULD BE CONSTRUED IN FAVOR OF THE LAWFUL PERMANENT RESIDENT

For the reasons already stated, *Landgraf*'s two-step test yields a clear result: § 101(a)(13)(C)(v) does not apply to conduct occurring before its effective date. But if any doubt remains about whether it is impermissibly retroactive, this Court should construe the statute in favor of lawful permanent residents. "The presumption against retroactive application of ambiguous statutory provisions [is] buttressed by 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *St. Cyr*, 533 U.S. at 320 (quoting *Cardoza-Fonseca*, 480 U.S. at 449); *see also INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Costello*, 376 U.S. at 128. Thus, even where "construe[ing] this statutory provision less generously to the alien might find support in logic," this Court must "nonetheless be constrained by accepted principles of statutory construction in this area of law to resolve that doubt in favor of the petitioner." *Costello*, 376 U.S. at 128.

Because "deportation is a drastic measure and. . . . a penalty," this Court should "resolve the doubts in favor of [the more lenient] construction." *Fong Haw Tan*, 333 U.S. at 10. This rule, akin to the rule of lenity, ensures that an immigration penalty or

disability will apply retroactively only when Congress has considered these consequences and expressed its intent with unmistakable clarity. To the extent that any ambiguity remains, this Court should "not assume that Congress meant to trench on [an immigrant's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Id.* Thus, INA § 101(a)(13)(C)(v) should be read to apply prospectively only to offenses or pleas occurring after its effective date.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals and remand for further proceedings.

Respectfully submitted,

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November 15, 2011

STATUTORY APPENDIX

I. Former INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994), as in effect before 1997

8 U.S.C. § 1101 (1994). Definitions

(a) As used in this chapter –

(13) The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

II. Current INA § 101(a)(13)(A), (C), 8 U.S.C. § 1101(a)(13)(A), (C) (as amended by IIRIRA § 301(a), effective Apr. 1, 1997)

8 U.S.C. § 1101. Definitions

(a) As used in this chapter –

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

* * *

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien –

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from

the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

III. Current INA § 212(a)(2)(A)-(D), 8 U.S.C. § 1182(a)(2)(A)-(D)

8 U.S.C. § 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if –

(I) the crime was committed when the alien was under 18 years of age, and the

crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political

offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe –

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of Title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the

financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who –

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

IV. Former INA § 212(c), 8 U.S.C. § 1182(c) (1994), as in effect before 1996 (repealed by IIRIRA § 304(b))

8 U.S.C. § 1182(c) (1994). Excludable aliens

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

RESPONDENT'S BRIEF

No. 10-1211

In the Supreme Court of the United States

PANAGIS VARTELAS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

In 1996, Congress amended 8 U.S.C. 1101(a)(13) to specify that those aliens seeking "admission" to the United States include lawful permanent resident aliens who are returning to the United States from travel abroad and who have committed an offense identified in 8 U.S.C. 1182(a)(2) (2006 & Supp. IV 2010). 8 U.S.C. 1101(a)(13)(C)(v).

The question presented is as follows:

Whether the amended definition of "admission" in 8 U.S.C. 1101(a)(13) is applicable to a lawful permanent resident alien who committed an offense identified in 8 U.S.C. 1182(a)(2) (2006 & Supp. IV 2010) (and was convicted of that offense upon a guilty plea) before 1996 and then departed from and returned to the United States in 2003.

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In the Supreme Court of the United States

No. 10-1211

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v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 620 F.3d 108. The decision of the Board of Immigration Appeals (Pet. App. 29-32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2010. A petition for rehearing was denied on January 4, 2011 (Pet. App. 33). The petition for a writ of certiorari was filed on April 4, 2011, and granted on September 27, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

1. a. In the immigration laws, Congress has "long made a distinction between those aliens who have come to our shores seeking admission * * * and those who are within the United States after an entry." *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958). Before 1996, the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, provided for two basic types of proceedings to determine whether an alien was removable from the United States: An alien seeking admission was placed in an "exclusion" proceeding, while an alien who had already entered the United States was placed in a "deportation" proceeding. *Landon* v. *Plasencia*, 459 U.S. 21, 25 (1982). In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress abolished the distinction between "exclusion" and "deportation" proceedings and instituted a new, uniform proceeding known as "removal." See 8 U.S.C. 1229, 1229a; *Judulang* v. *Holder*, No. 10-694 (Dec. 12, 2011), slip op. 1-2.

While unifying removal procedures, Congress maintained two separate lists of the substantive grounds for removal, with one still defining those that render an alien excludable (or, in the term the Act now uses, "inadmissible"), see 8 U.S.C. 1182(a) (2006 & Supp. IV 2010), and the other defining those that render an alien deportable, see 8 U.S.C. 1227(a) (2006 & Supp. IV 2010). See 8 U.S.C. 1229a(e)(2) (specifying that an alien is "removable" if "inadmissible" or "deportable"); *Judulang*,

slip op. 2. Because the lists differ, an alien may be inadmissible without being deportable, and vice versa.

Both before and after the enactment of IIRIRA, the class of inadmissible aliens has included "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of * * * a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime." 8 U.S.C. 1182(a)(2)(A)(i)(I). As relevant here, counterfeiting offenses are crimes involving moral turpitude. See *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 423 (1933).

b. Until 1996, the INA defined an "entry" into the United States as "any coming of an alien into the United States, from a foreign port or place." 8 U.S.C. 1101(a)(13) (1994). But the definition specified that a lawful permanent resident alien (LPR) returning from abroad would "not be regarded as making an entry into the United States * * * if the alien prove[d] * * * that his departure to a foreign port or place * * * was not intended or reasonably to be expected by him or * * * was not voluntary." *Ibid.*

Construing that definition in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), this Court observed that it did "not think Congress intended to exclude aliens long resident in this country after lawful entry who have merely stepped across an international border and returned in 'about a couple of hours.'" *Id.* at 461. The Court therefore held "that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." *Id.* at 462.

c. In Section 301(a) of IIRIRA, Congress replaced the earlier definition of "entry" with a new definition of "admission," and it specified the circumstances under which an LPR returning to the United States from abroad would be treated as seeking "admission" and therefore subject to the limitations on admissibility contained in 8 U.S.C. 1182 (2006 & Supp. IV 2010). IIRIRA § 301(a), 110 Stat. 3009-575. The new definition states that the terms "admission" and "admitted" refer to "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A). The Act further provides that an LPR "shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless" he or she is covered by one of six enumerated exceptions, one of which applies to any alien who "has committed an offense identified in section 1182(a)(2) of this title"—that is, an offense identified in the provision setting out the grounds of inadmissibility. 8 U.S.C. 1101(a)(13)(C)(v).

In 1998, the Board of Immigration Appeals (Board) held that a returning LPR described in Section 1101(a)(13)(C) "shall be regarded as 'seeking an admission' into the United States, without regard to whether the alien's departure from the United States might previously have been regarded as 'brief, casual, and innocent' under the *Fleuti* doctrine." *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1065-1066 (1998) (en banc).

2. Petitioner, a native and citizen of Greece, has been an LPR since 1989. Pet. App. 2. In 1992, he participated in a scheme to manufacture and sell $50,000 in counterfeit traveler's checks. Administrative Record (A.R.) 299-300. In 1994, he pleaded guilty to conspiracy to make or possess counterfeit securities, in violation of

18 U.S.C. 371, and was sentenced to four months of imprisonment. Pet. App. 2-3.

In January 2003, petitioner left the United States to visit Greece. Pet. App. 4; A.R. 318. Upon his return in late January, he sought entry into the United States as a returning LPR. Pet. App. 4; A.R. 360. In March 2003, he was placed in removal proceedings as an arriving alien who was inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I) on account of his 1994 conviction for a crime involving moral turpitude. Pet. App. 4.

Before an immigration judge, petitioner conceded that he was removable but sought discretionary relief from removal under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994) (repealed 1996). Pet. App. 4. Following a hearing, the immigration judge denied his application, finding that the equities did not warrant relief because, among other things, petitioner's testimony was "close to incredible"; he "appear[ed] to be not merely remiss in his tax obligations, but a serious tax evader"; and he had "demonstrated no hardship to himself should he return to Greece," where "he [had] an extensive family business and property." A.R. 111, 116; see Pet. App. 5. The immigration judge ordered petitioner removed to Greece. *Ibid.*

3. a. On appeal, the Board adopted and affirmed the immigration judge's decision. A.R. 51; see Pet. App. 5-6.

b. Petitioner subsequently moved to reopen the proceedings, alleging that he had received ineffective assistance of counsel. Pet. App. 29. He argued that he had been prejudiced by his previous attorney's failure to challenge his removability on the ground that the statutory definition of "admission," as amended by IIRIRA, should not apply to him because "[h]e pled guilty to a crime of moral turpitude at a time when he would not be

considered an alien seeking 'entry' upon returning to the United States." A.R. 26; Pet. App. 6-7. In support of that argument, he cited *Camins* v. *Gonzales*, 500 F.3d 872 (9th Cir. 2007), which held that IIRIRA's amendment to Section 1101(a)(13) was not applicable to LPRs who pleaded guilty to crimes before IIRIRA's effective date. A.R. 26; Pet. App. 31-32.

The Board denied petitioner's motion to reopen. Pet. App. 29-32. It concluded that petitioner had failed to show that his prior counsel's performance had prejudiced his case, and that petitioner's reliance on the Ninth Circuit's decision in *Camins* was misplaced because it did not govern his proceeding (which was within the Second Circuit) and had been decided two years after he had conceded his inadmissibility. *Id.* at 31-32.

4. The court of appeals denied a petition for review. Pet. App. 1-28. The court held that, for purposes of his claim of ineffective assistance of counsel, petitioner had "failed to show prejudice under any standard." *Id.* at 13.

In reaching that conclusion, the court of appeals determined that the Board had "reasonably interpreted IIRIRA as superseding the *Fleuti* doctrine." Pet. App. 20. In considering whether IIRIRA "was impermissibly retroactive as applied to [petitioner]," the court applied the two-step inquiry described in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). Pet. App. 20. For purposes of the first step, the court noted that the government conceded that "Congress has not expressly prescribed the temporal reach of" the amended version of Section 1101(a)(13). *Id.* at 20-21. With respect to the second step of the *Landgraf* analysis, however, the court held that the amended definition did not have a genuinely retroactive effect on petitioner because he could not claim that he had reasonably relied on the former

version of the law in deciding to participate in a counterfeiting scheme. *Id.* at 21-27. The court explained that Section 1101(a)(13)(C)(v)—unlike former Section 212(c) of the INA, which had been at issue in *INS* v. *St. Cyr*, 533 U.S. 289 (2001)—"does not hinge on either an LPR's conviction or his decision to plead guilty; rather, it turns on whether the LPR 'has *committed* an offense identified in [S]ection 1182(a)(2).'" Pet. App. 24 (quoting 8 U.S.C. 1101(a)(13)(C)(v)).

Observing that some definitions in the INA refer to an alien's conviction and some refer to an alien's commission of an offense, the court of appeals concluded that "Congress intended the focus [in Section 1101(a)(13)(C)(v)] to be on the alien's commission of the crime." Pet. App. 25. The court noted that it had "consistently rejected the notion that an alien can reasonably have relied on provisions of the immigration laws in 'committ[ing]' his crimes." *Ibid.* (brackets in original). Accordingly, it held that applying Section 1101(a)(13)(C)(v) to petitioner's "January 2003 foreign trip—an event begun and completed long after the effective date of IIRIRA—is not impermissibly retroactive, for * * * it would border on the absurd to suggest that [petitioner] committed his counterfeiting crime in reliance on the immigration laws." *Id.* at 27.

The court of appeals acknowledged that two other circuits had reached a contrary conclusion. Pet. App. 27. But the court found those decisions "unpersuasive," in part because they both "analyzed retroactivity in relation to the alien's plea of guilty" and therefore failed to "address[]" the Act's "focus on the LPR's 'commi[ssion]' of the crime, or on the lack of rationality in any claim that the LPR reasonably relied on the immigration laws in deciding to break the criminal laws." *Id.* at 27-28 (dis-

cussing *Camins*, *supra*, and *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004)) (second brackets in original).

SUMMARY OF ARGUMENT

Under 8 U.S.C. 1101(a)(13)(C)(v), as amended by IIRIRA in 1996, a lawful permanent resident alien who has left the United States and wishes to return will be regarded an applicant for "admission" if he has "committed an offense identified in" 8 U.S.C. 1182(a)(2) (2006 & Supp. IV 2010)—that is, an offense that would constitute a ground of inadmissibility. The court of appeals correctly held that the amendment to Section 1101(a)(13) applies to all returning aliens, including those who committed criminal offenses before IIRIRA was enacted.

In determining the temporal scope of a statute, this Court applies the two-part test described in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). The first step entails determining whether Congress has specified the statute's reach. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that Congress did not do so in IIRIRA. It is therefore appropriate to proceed to the second step of the *Landgraf* inquiry, which calls for a "commonsense, functional judgment" of whether the application of the statute would have a retroactive effect. *Martin* v. *Hadix*, 527 U.S. 343, 357 (1999). The Court has identified several factors that inform that judgment, and in this case, all of them indicate that applying Section 1101(a)(13)(C) to aliens whose convictions predate IIRIRA would not have a retroactive effect.

First, the statute applies only to aliens who engage in the post-enactment conduct of attempting to enter the United States. This Court made clear in *Landgraf* that

a regulation of post-enactment conduct is not retroactive, even if it takes into account pre-enactment conduct.

Second, Section 1101(a)(13)(C) does not "impair rights a party possessed when he acted," *Landgraf*, 511 U.S. at 280, because aliens have no vested right to enter (or reenter) the United States. Congress possesses plenary power to regulate immigration by preventing aliens from entering the United States. And even under pre-IIRIRA law, petitioner's travels may have subjected him to exclusion from the United States. He therefore cannot plausibly claim to have had a right to leave the United States and return without seeking readmission.

Third, the statute does not undermine "reasonable reliance" by aliens, *Landgraf*, 511 U.S. at 270, because aliens could not reasonably have relied on pre-IIRIRA law in deciding to commit crimes identified in the grounds of inadmissibility. Unlike the provision at issue in *St. Cyr*, which for certain LPRs altered the consequences of a conviction obtained following a guilty plea, Section 1101(a)(13)(C) applies to any alien who has committed an offense, whether or not he has been convicted of it. The "reliance" at issue here is therefore more akin to that involved in *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), in which this Court rejected a retroactivity claim similar to the one petitioner asserts.

Several Justices in *Landgraf* suggested that the temporal scope of a statute should be determined based on an analysis of "what is the relevant activity that the rule regulates." *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring in the judgment). That analysis points to the same conclusion as the factors identified by the *Landgraf* majority. Because Section 1101(a)(13) is intended to regulate the admission of aliens to the United

States, not to deter or punish past criminal conduct by aliens, it is not retroactive.

Finally, petitioner errs in suggesting that ambiguities in immigration statutes should be construed in favor of aliens. Whatever the force of that principle in other contexts, it has no relevance to the analysis of a statute's retroactive effect under *Landgraf*.

ARGUMENT

8 U.S.C. 1101(a)(13) GOVERNS THE ADMISSION TO THE UNITED STATES OF ALIENS WHO COMMITTED CRIMES BEFORE AS WELL AS AFTER ITS ENACTMENT

IIRIRA amended 8 U.S.C. 1101(a)(13) to provide that LPRs who are returning to the United States will be deemed to be seeking admission if, among other things, they have committed an offense identified in the provision that sets out the grounds of inadmissibility. That amendment abrogates the holding in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), that LPRs were deemed not to be seeking to reenter the United States if they had taken an "innocent, casual, and brief" foreign trip, *id.* at 462. See Pet. Br. 8. By its terms, the amended version of Section 1101(a)(13) applies to all aliens. This case presents the question whether the amendment applies to aliens, such as petitioner, who before the enactment of IIRIRA committed crimes identified in the statutory grounds of inadmissibility.

Under *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), this Court applies a two-part test in determining the temporal scope of a statute. First, the Court asks "whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. Second, it asks "whether the new statute would have retroactive effect," in which case a presumption against retroactivity applies.

Ibid. Under *Landgraf*, the amended version of Section 1101(a)(13) is not retroactive as it applies to the circumstances of this case, and it therefore governs petitioner's situation.

A. This Court Has Held That Congress Did Not Expressly Prescribe The Temporal Reach Of IIRIRA's Amendment To Section 1101(a)(13)

1. The amendment to Section 1101(a)(13) that is at issue here was contained in Section 301(a) of IIRIRA, which was part of Title III-A of that statute. 110 Stat. 3009-575. Section 309(a) of IIRIRA states that "the amendments made by [Title III-A] shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment" of IIRIRA. 110 Stat. 3009-625. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that that effective-date provision was insufficient to resolve the ambiguity in the temporal scope of another provision of Title III-A of IIRIRA, Section 304(b). *Id.* at 317-320. That holding is equally applicable here, and it compels the conclusion that Congress has not "expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. The Court should therefore proceed to the second step of the *Landgraf* analysis.

2. Petitioner suggests (Br. 20 n.3) that Congress expressed a "clear intent *not* to make" the amendment to Section 1101(a)(13) applicable to LPRs with pre-IIRIRA criminal convictions. He notes that, while Section 1101(a)(13)(C)(v) provides that LPRs returning to the United States will be deemed to be seeking admission if they have committed a crime involving moral turpitude, it exempts those aliens who "have been granted relief under [8 U.S.C.] 1182(h) or 1229b(a)." It does not,

however, exempt aliens who have received discretionary relief under former Section 212(c) of the INA, which IIRIRA repealed. See 8 U.S.C. 1182(c) (1994); IIRIRA § 304(b), 110 Stat. 3009-597. According to petitioner (Br. 21 n.3), "[t]he only logical explanation" for that omission "is that IIRIRA eliminated former § 212(c) waivers for future offenses, and [Section 1101(a)(13)(C)(v)] was intended to apply only to post-IIRIRA offenses."

Petitioner's reasoning is flawed. Waivers under Section 1182(h) predate IIRIRA, and nothing in the text of the statute distinguishes among Section 1182(h) waivers on the basis of the date on which they were granted. Moreover, Section 1101(a)(13)(C)(v) exclusively addresses inadmissibility under Section 1182(a)(2), and Section 1182(h), likewise, applies exclusively to certain subparagraphs of Section 1182(a)(2). By contrast, a waiver under former Section 212(c) may be granted with regard to *any* ground of inadmissibility, except Section 1182(a)(3) and (9)(C). 8 U.S.C. 1182(c) (1994). It is hardly surprising that a waiver that may be granted for diverse grounds of inadmissibility that typically involve lesser harms than the criminal activity described under Section 1182(a)(2)—such as visa fraud or being a public charge, see 8 U.S.C. 1182(a)(4) and (6)(C)—would be insufficient to insulate a returning LPR from the effect of Section 1101(a)(13)(C)(v).

In addition, petitioner overlooks that relief under former Section 212(c) was more easily obtained than is discretionary relief under the provisions that replaced it. For example, many criminal aliens who were eligible for Section 212(c) relief are statutorily ineligible for cancellation of removal under 8 U.S.C. 1229b (2006 & Supp. IV 2010). Compare 8 U.S.C. 1182(c) (1994) (making re-

lief unavailable to "an alien who has been convicted of one or more aggravated felonies and has served * * * a term of imprisonment of at least 5 years"), with 8 U.S.C. 1229b(a)(3) (making relief unavailable to any alien who has "been convicted of any aggravated felony"), and 8 U.S.C. 1229b(c) (making relief unavailable to various other classes of aliens); see IIRIRA § 321, 110 Stat. 3009-627 (expanding the category of crimes designated "aggravated felon[ies]"). Likewise, an applicant for a waiver under 8 U.S.C. 1182(h)(1)(B) bears a much greater burden than an applicant for former Section 212(c) relief, see 8 U.S.C. 1182(h)(1)(B) (requiring that the applicant establish that "the alien's denial of admission would result in extreme hardship" to a qualifying family member), and many aliens who were eligible for Section 212(c) relief are ineligible for a waiver under 8 U.S.C. 1182(h), see *ibid.* (rendering an LPR convicted of an aggravated felony ineligible). The decision not to exempt aliens who had obtained Section 212(c) relief therefore reflects a view that those aliens should be examined again, to make sure that it is appropriate to readmit them in light of the new provisions governing admission of aliens outside the United States, under which discretionary relief is available but under heightened standards. It does not indicate an intent to apply the amendments to Section 1101(a)(13) only to LPRs with post-IIRIRA convictions.

B. Application Of Section 1101(a)(13)(C) In The Circumstances Presented Here Would Not Have A Retroactive Effect

The second step in the *Landgraf* inquiry is to "determine whether the new statute would have a retroactive effect, *i.e.*, whether it would impair rights a party pos-

sessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 511 U.S. at 280. Determining whether the effect of a statute would be retroactive requires a "commonsense, functional judgment" that is "informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (quoting *Landgraf*, 511 U.S. at 270). In making that functional judgment, this Court has looked to Justice Story's definition of a retroactive statute as one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Society for the Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156); see *Landgraf*, 511 U.S. at 269.

In this case, all of those considerations point to the conclusion that the application of Section 1101(a)(13)'s definition of admission to aliens who committed crimes before IIRIRA would not have a retroactive effect. First, the statute applies only to aliens who engage in the post-enactment conduct of attempting to enter the United States. Second, it does not "impair rights a party possessed when he acted," *Landgraf*, 511 U.S. at 280, because aliens have no vested right to enter the United States. Third, it does not undermine "reasonable reliance" by aliens, *id.* at 270, because aliens could not reasonably have relied on pre-IIRIRA law in deciding to commit crimes that would render them inadmissible. And although petitioner invokes this Court's decision in *St. Cyr*, that case was altogether different from this one with respect to the prospect of reasonable reliance.

1. Section 1101(a)(13)(C) applies only to aliens who engage in the post-IIRIRA conduct of attempting to enter the United States

As this Court observed in *Landgraf*, "a statute is not made retroactive merely because it draws upon antecedent facts for its operation," since "[e]ven uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct." 511 U.S. at 269-270 n.24 (internal quotation marks omitted). Instead, "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." *Id.* at 273. One such "unquestionably proper" application is when the statute regulates conduct in the future, even when that regulation is based in part on prior events. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 (2006); see also *Landgraf*, 511 U.S. at 293 n.3 (Scalia, J., concurring in the judgment) (noting that "the presumption against retroactivity is not violated by interpreting a statute to alter the future legal effect of past transactions"). Because 8 U.S.C. 1101(a)(13)(C) defines the circumstances in which an alien's future conduct will constitute a request for "admission" to the United States, it does not "attach[] new legal consequences to events *completed* before its enactment," and it therefore does not have a retroactive effect when applied to aliens who committed crimes before its enactment. *Landgraf*, 511 U.S. at 270 (emphasis added).

a. Section 1101(a)(13) is part of the INA's comprehensive regulation of the entry of aliens into the United States. Under IIRIRA's effective-date provision, IIRIRA's amendments to Section 1101(a)(13) apply only to entries that take place after the enactment of the statute. See IIRIRA § 309(a), 110 Stat. 3009-625.

Section 1101(a)(13)(A) provides a general definition of "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Section 1101(a)(13)(C) sets out an exception to that general rule, specifying that "[a]n alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws"—unless one of six conditions is present. In some respects, Section 1101(a)(13)(C) provides a more generous rule than *Fleuti* did. For example, a returning LPR will not be deemed to be seeking admission if he has not been "absent from the United States for a continuous period in excess of 180 days," 8 U.S.C. 1101(a)(13)(C)(ii), even though a 180-day absence might well have been too long to qualify as "brief" or "casual" under *Fleuti*. See 374 U.S. at 462. In other respects, Section 1101(a)(13)(C) incorporates a strand of *Fleuti*'s analysis, by, for example, deeming the alien to be applying for admission if he engaged in illegal activity after having departed the United States. See 8 U.S.C. 1101(a)(13)(C)(iii); *Fleuti*, 374 U.S. at 462. And in still other respects, Section 1101(a)(13)(C) is narrower than *Fleuti*, as in its exception for aliens who have committed offenses covered by Section 1182(a)(2). 8 U.S.C. 1101(a)(13)(C)(v). These features strongly suggest that Congress meant for that entire set of new provisions to apply to attempted entries after IIRIRA's effective date.

Significantly, in identifying the cases in which a returning LPR will be deemed to be seeking admission, Section 1101(a)(13)(C) employs the future-looking phrase "shall not be regarded," further demonstrating that the provision governs only conduct occurring after

its enactment. See *United States* v. *Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). Indeed, petitioner does not appear to dispute that Section 1101(a)(13)(C) is applicable only to aliens who engage in conduct—seeking to enter the United States—after the enactment of IIRIRA. To paraphrase this Court's most recent decision addressing retroactivity at length in the immigration context, it is "the alien's choice" to depart and then seek to re-enter the country "after the effective date of the new law, that subjects him to the new and less generous legal regime," not merely the commission of a prior offense. *Fernandez-Vargas*, 548 U.S. at 44. Because Section 1101(a)(13)(C) regulates post-enactment conduct, its effect is not retroactive.

b. Petitioner invokes (Br. 26) the prohibition on the retroactive application of criminal statutes embodied in the Ex Post Facto Clause, U.S. Const. Art. I, § 9, but his reliance on that principle is misplaced because removal from the United States is not a criminal punishment and therefore is not subject to the Ex Post Facto Clause. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952). In any event, cases involving the Ex Post Facto Clause reinforce the conclusion that the application of Section 1101(a)(13)(C) to petitioner's post-IIRIRA entry to the United States is not retroactive.

To prevail in a challenge to a statute under the Ex Post Facto Clause, it is not sufficient for a defendant to show that some portion of his conduct occurred before the enactment of a new criminal punishment. Rather, when characterizing the retroactivity inquiry under the Ex Post Facto Clause, this Court has repeatedly spoken of the imposition of new punishments on "crimes that have already been committed," or acts that were "com-

pleted," or "consummated," or "done" before the statute became effective. See, *e.g.*, *California Dep't of Corr.* v. *Morales*, 514 U.S. 499, 505 (1995) ("[A] legislature may not stiffen the 'standard of punishment' applicable to crimes that have already been committed.") (quoting *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937)); *ibid.* ("[T]he Constitution 'forbids the application of any new punitive measure to a crime already consummated.'") (quoting *Lindsey*, 301 U.S. at 401); *Collins* v. *Youngblood*, 497 U.S. 37, 49 (1990) ("A law that abolishes an affirmative defense of justification or excuse" violates the Ex Post Facto Clause "because it expands the scope of a criminal prohibition after the act is done."); *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'") (quoting *Weaver* v. *Graham*, 450 U.S. 24, 31 (1981)).

Thus, a prosecution for a course of conduct that straddles the effective date of a statute does not violate the Ex Post Facto Clause as long as at least one of the acts constituting the offense took place after the statute was enacted. For example, courts of appeals have upheld convictions of those who "conducted an enterprise through a pattern of racketeering activity having its inception" before 18 U.S.C. 1962(c) took effect, as long as the government "established that an act of racketeering occurred *after* the section's effective date." *United States* v. *Brown*, 555 F.2d 407, 416-417 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); accord *United States* v. *Campanale*, 518 F.2d 352, 364-365 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

Courts have reached similar conclusions in cases involving 18 U.S.C. 922(g), which prohibits the possession of firearms by convicted felons. In particular, courts

have uniformly approved the application of Section 922(g) to individuals who were convicted of a felony before the statute was enacted. See, *e.g.*, *United States* v. *Pfeifer*, 371 F.3d 430, 436 (8th Cir. 2004) (citing cases). As long as one element of the offense—the possession of a firearm—is committed after the statute's enactment, the application of the statute is not impermissibly retroactive. See *United States* v. *Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001) ("A law is not retroactive simply because it 'draws upon antecedent facts for its operation.'") (quoting *Cox* v. *Hart*, 260 U.S. 427, 435 (1922)).

To the extent ex post facto principles shed light on the question in this case, they confirm that Section 1101(a)(13)(C) is not retroactive because it applies only to aliens who attempt to enter the United States after IIRIRA's effective date.

c. Nonetheless, throughout his brief, petitioner fails to take account of the fact that the amended version of Section 1101(a)(13)(C) applies only to aliens who have engaged in post-IIRIRA conduct. For example, petitioner asserts (Br. 23-24) that "removal operates as a penalty" and that IIRIRA therefore "add[s] a new penalty to the pre-IIRIRA offenses" committed by LPRs. But Section 1101(a)(13)(C) does not provide for the removal of any aliens. Rather, it makes certain LPRs subject to the INA's admissibility requirements, but only if they make a post-IIRIRA attempt to enter the United States.

Similarly, petitioner argues that because the statute prevents LPRs from asserting what he labels as their "*Fleuti* defense" in removal proceedings, it is akin to a "'law that abolishes an affirmative defense,'" which has been held to be impermissibly retroactive. Br. 26 (quoting *Collins*, 497 U.S. at 49). But even assuming that the

Fleuti doctrine's analysis of what is an entry could properly be characterized as an affirmative "defense" comparable to one under a criminal statute, that analogy does not help petitioner. A law that abolishes a defense raises retroactivity concerns only when it is applied "after the act is done." *Collins*, 497 U.S. at 49; see *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 952 (1997) (applying the presumption against retroactivity to conclude that an amendment eliminating a defense to liability under the False Claims Act did not apply "to conduct completed before its enactment"). And Section 1101(a)(13)(C) abrogates the *Fleuti* doctrine only for LPRs whose reentry to the United States occurs after its enactment.

2. Section 1101(a)(13)(C) does not impair vested rights

Petitioner asserts (Br. 25) that, "[u]ntil IIRIRA, lawful permanent residents enjoyed the right to take and return from brief trips abroad." In his view (Br. 28, 31), IIRIRA "imposes a substantive disability" on aliens in his position by "abridging [their] right to travel" abroad. As the court of appeals observed, however, Section 1101(a)(13)(C) in no way restricts petitioner's ability to travel abroad; it affects only his ability "to enter the United States again—a matter that is squarely within the province of Congress to regulate." Pet. App. 27. And while petitioner states (Br. 31) that restricting his ability to reenter will force him to choose between maintaining his residence in the United States and visiting his family in Greece, the presumption against retroactivity "is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law." *Fernandez-Vargas*, 548 U.S. at 46. The effect of IIRIRA on petitioner's ability to return to the United

States after traveling abroad does not make the statute retroactive.

a. Petitioner does not expressly argue that he had a "vested right" to travel abroad without being required to seek readmission upon his return—and with good reason. See *Landgraf*, 511 U.S. at 269 (quoting *Society for the Propagation of the Gospel*, 22 F. Cas. at 767). An alien, even one lawfully admitted for permanent residence, has no vested right to remain in the United States—or to return to the United States after having departed—and Congress retains the authority to order the expulsion or exclusion of aliens at any time.

This Court has long held that the ability to control the borders and prohibit or permit entry is a core sovereign prerogative. *Landon* v. *Plasencia*, 459 U.S. 21, 33 (1982). It is an exercise of Congress's plenary power, rooted in the Nation's sovereignty, to determine which aliens are welcome here and which are not. See *Harisiades*, 342 U.S. at 587 ("The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose."); see also *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972) ("Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (internal quotation marks omitted); *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952) ("So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders."). As Judge Learned Hand put it, "[t]he interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall

go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate." *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F.2d 489, 490 (2d Cir. 1950).

In light of Congress's plenary power over the admission of aliens, this Court has held that removal from the United States, even if based on an alien's past criminal conduct, is not punitive and therefore is not impermissibly retroactive. For that reason, the Court has rejected Ex Post Facto Clause challenges to statutes requiring deportation of aliens on the basis of pre-enactment conduct. See, *e.g.*, *Harisiades*, 342 U.S. at 594. As the Court has explained, a removal proceeding "looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); see *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913) (Holmes, J.) ("[N]or is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want."); *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924).

From those principles, it follows *a fortiori* that a statute requiring criminal LPRs to seek *admission* after departing the country does not impair any vested right, nor is its effect properly regarded as retroactive.

b. The historical context in which IIRIRA was enacted makes it particularly implausible to suppose that applying Section 1101(a)(13)(C) in the circumstances of this case would impair any settled rights of LPRs who committed pre-enactment crimes involving moral turpitude. Less than six months before it enacted IIRIRA, Congress expanded the circumstances under which aliens could be deported for crimes involving moral tur-

pitude, and it made that amendment applicable to aliens whose criminal conduct was already completed.

In Section 435(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1274, Congress amended 8 U.S.C. 1227(a)(2)(A), which provides for the deportation of aliens who have committed crimes involving moral turpitude within five years of their admission to the United States. While the predecessor to that section applied only to crimes for which the alien actually received a sentence of more than one year of imprisonment, the amended version applies to all crimes that are punishable by more than one year of imprisonment, regardless of the sentence imposed. Compare 8 U.S.C. 1251(a)(2)(A) (1994) ("sentenced to confinement or is confined * * * in a prison or correctional institution for one year or longer"), with 8 U.S.C. 1227(a)(2)(A) ("convicted of a crime for which a sentence of one year or longer may be imposed"). The new version applies to all aliens whose removal proceedings were commenced after the effective date of AEDPA. See AEDPA § 435(b), 110 Stat. 1275. And the difference in the two provisions can be significant in cases such as petitioner's: petitioner received a sentence of only four months, but the crime of which he was convicted was punishable by up to five years of imprisonment. See Pet. App. 2-3; 18 U.S.C. 371.

Under current Board precedent, petitioner himself is not deportable because his offense occurred more than five years after his admission to the United States. See *In re Alyazji*, 25 I. & N. Dec. 397, 406-407 & n.8 (B.I.A. 2011). But at the time he undertook the travel at issue in this case, petitioner would have been deportable because his 1989 adjustment to LPR status would have

been regarded as an "admission" to the United States, and his crime was committed within five years of that admission. See *In re Shanu*, 23 I. & N. Dec. 754 (B.I.A. 2005), overruled in part by *Alyazji*, *supra*; see also *In re Rosas-Ramirez*, 22 I. & N. Dec. 616 (B.I.A. 1999). More generally, the rule petitioner advocates would apply to many aliens who were unquestionably made deportable by AEDPA. It makes little sense to say that criminal conduct that could subject an alien to deportation cannot also, without offending principles of retroactivity, restrict the alien's ability to reenter the United States after leaving the country.

c. Petitioner's argument is further undermined by the fact that pre-IIRIRA law did not clearly establish which trips an LPR could take outside the United States without being regarded as seeking entry upon his return. In *Fleuti*, this Court construed the prior version of 8 U.S.C. 1101(a)(13) to deem an LPR to be making an entry only if he intended his departure to be "meaningfully interruptive" of his permanent residence status. 374 U.S. at 462. The Court did not define "meaningfully interruptive," leaving that term to "be developed by the gradual process of judicial inclusion and exclusion." *Ibid.* (internal quotation marks omitted); see *Heitland* v. *INS*, 551 F.2d 495, 504 (2d Cir.) ("[T]he significance of an absence will depend upon the relevant factors and circumstances found in each case."), cert. denied, 434 U.S. 819 (1977). And the Court suggested that an alien might "imperil[] his status by interrupting his residence too frequently or for an overly long period of time." *Fleuti*, 374 U.S. at 461.

Before IIRIRA, the application of *Fleuti* to petitioner would have been far from certain. The immigration judge noted that, aside from the trip at issue in this

case, petitioner had spent significant periods of time in Greece, ranging from two to nine months per year. A.R. 111-112. The frequency and duration of those trips might well have rendered him subject to exclusion (now inadmissibility) even under *Fleuti*. See, *e.g.*, *Dabone* v. *Karn*, 763 F.2d 593, 596 (3d Cir. 1985) (rejecting an alien's *Fleuti* argument and noting the "the numerous trips he made in and out of the United States"); *Lozano-Giron* v. *INS*, 506 F.2d 1073, 1078 (9th Cir. 1974) ("In a period of somewhat more than two years, he was absent on three occasions for a total of seven months. This may under *Fleuti* be 'too frequently or for an overly long period of time.'") (quoting *Fleuti*, 374 U.S. at 461). The uncertainty surrounding the application of *Fleuti* forecloses any suggestion that IIRIRA removed any "vested right" to reenter the United States that LPRs had previously enjoyed. See *Fernandez-Vargas*, 548 U.S. at 44 n.10 (describing a "vested right[]" as "an immediate fixed right of present or future enjoyment") (quoting *Pearsall* v. *Great Northern Ry.*, 161 U.S. 646, 673 (1896)). In fact, as noted above, Section 1101(a)(13)(C) replaced *Fleuti*'s fact-specific analysis with, *inter alia*, a bright-line, generous exception for LPRs who remain outside the United states for 180 days or less. IIRIRA thus liberalized and lent predictability to *Fleuti* in an important respect that operates to the benefit of many aliens.

3. Section 1101(a)(13)(C) does not impair any reasonable reliance interests

Petitioner argues (Br. 15) that the presumption against retroactivity "does not require proof of reliance on the prior state of the law." While it is true that the Court has not required a party challenging the applica-

tion of a statute to show that he was subjectively aware of the prior law and relied on it in structuring his conduct, the likelihood of reliance, and whether any such reliance is reasonable, are nevertheless significant factors in the retroactivity analysis. As this Court has explained, the inquiry into whether a statute has a retroactive effect "should be informed and guided by 'familiar considerations of fair notice, *reasonable reliance*, and settled expectations.'" *Martin*, 527 U.S. at 357-358 (emphasis added) (quoting *Landgraf*, 511 U.S. at 270); see *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696 (2004) ("The aim of the presumption [against retroactivity] is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct."). Indeed, just this Term, the Court held that, to succeed on a claim that certain Board decisions "were impermissibly retroactive," an alien "would have to show, at a minimum, that in entering his guilty plea, he had reasonably relied on a legal rule from which [the decisions] departed." *Judulang* v. *Holder*, No. 10-694 (Dec. 12, 2011), slip op. 20 n.12. And as discussed below, see pp. 32-35, reliance was crucial to this Court's decision in *St. Cyr*, in which the Court held that, because aliens in St. Cyr's position "almost certainly relied upon [the] likelihood [of receiving relief under former Section 212(c)] in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." 533 U.S. at 325.

According to petitioner (Br. 36), application of Section 1101(a)(13)(C) in the circumstances presented here would upset "substantial reliance on existing law by lawful permanent residents who pleaded guilty" to crimes involving moral turpitude before the enactment of IIRIRA. That is incorrect.

a. Contrary to petitioner's assumption, the prior conduct that rendered him an applicant for admission under the amended definition of "admission" in Section 1101(a)(13), once he left the country and then sought to reenter after IIRIRA, was petitioner's commission of a criminal offense, not his decision to plead guilty. The statute refers to whether an LPR "has *committed* an offense identified in section 1182(a)(2)." 8 U.S.C. 1101(a)(13)(C)(v) (emphasis added). Petitioner does not dispute that he committed such an offense. Nor does he dispute that, as the court of appeals put it, "it would border on the absurd to suggest" that an alien reasonably relied on current immigration law in deciding to commit a crime. Pet. App. 27. See *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2d Cir. 2000) (rejecting the proposition that "aliens might have decided not to commit * * * crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation") (quoting *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000)), aff'd, 533 U.S. 289 (2001).

Petitioner asserts (Br. 47) that "the commission of an offense usually matters in practice only because it results in a conviction." It is true that a criminal conviction makes it easier to prove that an alien has in fact committed an offense. But an alien who has committed an offense can hardly be said to have a legitimate reliance interest in whatever practical impediments might prevent the government from establishing that fact in an immigration proceeding. And in any event, nothing in Section 1101(a)(13)(C), or any other law, prevents the government from establishing independently that a re-

turning LPR has committed a crime involving moral turpitude and should therefore be regarded as seeking admission. For example, the Third Circuit has upheld a Board decision treating a returning LPR as an applicant for admission on the basis of an arrest warrant for a crime of which he had not yet been convicted. *Doe* v. *Attorney Gen.*, 659 F.3d 266, 273 (2011); accord *Odoku* v. *INS*, 276 Fed. Appx. 21 (2d Cir. 2008) (reaching a similar conclusion based on an indictment). Although the Board recently held that a determination that an LPR is an applicant for admission should be made on the basis of clear and convincing evidence, the Board has not suggested that evidence of a conviction is required. See *In re Rivens*, 25 I. & N. Dec. 623, 624-627 & n.4 (2011), Dep't of Homeland Sec. mot. for recon. pending (filed Nov. 18, 2011).

Petitioner appears to take the position (Br. 48-49) that an LPR is deemed to be seeking an "admission" under Section 1101(a)(13)(C) only when he is actually inadmissible. Under 8 U.S.C. 1182(a)(2)(A)(i), an alien who is "convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of" a crime involving moral turpitude is inadmissible. In petitioner's view, Section 1101(a)(13)(C) must require a conviction before a returning LPR may be deemed to be seeking admission in order to make it parallel to Section 1182(a)(2)(A)(i). As an initial matter, Section 1182(a)(2)(A)(i) renders an alien inadmissible not only if he has been convicted of a crime involving moral turpitude, but also if he admits committing acts that constitute such a crime. In any event, as the court of appeals noted, some provisions of the INA turn on convictions, while others turn on the commission of offenses, and Congress's distinctions be-

tween the two were presumably intentional. Pet. App. 25; see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (When Congress "uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:06, at 194 (6th rev. ed. 2000)).

Here, the reason for the distinction is evident. Section 1101(a)(13) appears in the section of the INA that defines terms, such as "admission," that are used throughout the Act. As applied in the present context, it determines at the threshold how an alien at the border will be treated—*i.e.*, whether he will be subject to the general procedural and substantive standards applicable to aliens seeking admission in the first place. By contrast, Section 1182(a)(2)(A)(i) provides one substantive ground of inadmissibility for an alien who has been determined at the threshold to be regarded as an alien seeking admission.

Thus, Section 1101(a)(13)(C) merely ensures that certain LPRs returning to the United States after traveling abroad will "be regarded as seeking an admission into the United States for purposes of the immigration laws." 8 U.S.C. 1101(a)(13)(C). There is no reason to conclude that Congress intended that the category of LPRs who would be subject to an inquiry about their admissibility would be limited to those LPRs who are in fact inadmissible. To the contrary, the definition of "admission" plainly requires some LPRs to be examined for inadmissibility (and thus *potentially* refused admission) on the basis of facts that would not in the end suffice to actually render them inadmissible. For example, 8 U.S.C. 1101(a)(13)(C)(ii) applies to an LPR who "has been absent from the United States for a continuous

period in excess of 180 days," even though that is not a ground of inadmissibility. Petitioner thus errs in collapsing the category of those LPRs who may be subjected to an inquiry into their admissibility with the category of those LPRs who will eventually be found inadmissible.

The atextual nature of petitioner's interpretation is further demonstrated by his argument (Br. 50) that treating the category of aliens covered by Section 1101(a)(13)(C)(v) as distinct from those covered by Section 1182(a)(2) "would lead to absurd results." Petitioner notes that Section 1182(a)(2) makes certain aliens inadmissible for conduct that is not necessarily a criminal offense. See, *e.g.*, 8 U.S.C. 1182(a)(2)(C)(ii) (certain relatives of controlled-substance traffickers who knowingly "obtained any financial or other benefit from the illicit activity"). According to petitioner, it would be absurd to conclude that such LPRs would be able to reenter the United States without having to seek "admission" because they would not have "committed an offense identified in section 1182(a)(2)." 8 U.S.C. 1101(a)(13)(C)(v). But that conclusion is not absurd at all. Section 1101(a)(13)(C) singles out certain grounds of inadmissibility that were the subject of particular concern to Congress, and even on petitioner's reading, there are many grounds of inadmissibility that are not covered. See, *e.g.*, 8 U.S.C. 1182(a)(1) (2006 & Supp. IV 2010) ("Health-related grounds"); 8 U.S.C. 1182(a)(3) (2006 & Supp. IV 2010) ("Security and related grounds"). Moreover, petitioner's resolution of the supposed absurdity—treating Section 1101(a)(13)(A)(v) as simply a "cross-reference [to] the specific proof of commission required by" Section 1182(a)(2) (Br. 51)—would entail a substantial rewriting of the Act, requiring the

replacement of both "committed" and "offense" with different language.

Petitioner emphasizes the Board's decision in *Rivens* (Br. 48-49), which he reads for the proposition that the category of aliens covered by Section 1101(a)(13)(C)(v) is the same as the category covered by Section 1182(a)(2). That is incorrect. In *Rivens*, the Board held that the government "bears the burden of proving by clear and convincing evidence that a returning lawful permanent resident is to be regarded as seeking an admission." 25 I. & N. Dec. at 625. In that case, which involved a conviction, the Board remanded to an immigration judge for a determination of whether the alien's offense was a crime involving moral turpitude. *Id.* at 630. The Board observed that "[t]here remains an open question of who then bears the burden of showing admissibility, or a lack of admissibility." *Id.* at 626. The Board found it unnecessary to reach that question, however, because the conviction already presented in that case would coincidentally establish inadmissibility if it were found to be sufficient to establish that the alien was seeking admission. See *id.* at 627 ("Thus, if the [government] establishes that the respondent is an applicant for admission under [Section 1101(a)(13)(C)(v)], it will have de facto established the respondent's inadmissibility."). Nothing in the Board's decision in *Rivens* suggests that, in any other case, clear and convincing evidence other than conviction documents would be insufficient to establish that an alien was seeking admission. Such evidence might include, for example, eyewitness testimony, a confession given by the alien to police, or a jury's verdict of guilt in a case in which a final judgment of conviction had not yet been entered. In arguing to the contrary, petitioner mistakes the Board's obser-

vation about the particular facts in *Rivens* for a general conclusion about the meaning of the statute. But see *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.").

b. Petitioner rests much of his argument (Br. 40-45) on this Court's decision in *St. Cyr*, but that case does not support his position. *St. Cyr* involved IIRIRA's elimination of discretionary relief from removal under former Section 212(c) of the INA. The Court held that the elimination of eligibility for Section 212(c) relief had a retroactive effect in the case of an LPR who had pleaded guilty to the commission of an aggravated felony during the period, from 1990 to the enactment of IIRIRA, when an alien was ineligible for Section 212(c) relief if he was convicted of an aggravated felony and served a sentence of at least five years. 533 U.S. at 321-325. During that period, an alien who entered into a plea agreement under which he was convicted of an aggravated felony, but received a sentence of less than five years, would have remained eligible for Section 212(c) relief. The Court based its retroactivity ruling in *St. Cyr* in large part on the premise that, before IIRIRA, resident "aliens like St. Cyr had a significant likelihood of receiving § 212(c) relief" as a matter of discretion once they were found statutorily eligible for such relief. *Id.* at 325. The Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*" whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." *Id.* at 321-322 (internal quotation marks and citation omitted). In light of "the frequency with which

§ 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because the Court concluded that aliens in St. Cyr's position "almost certainly relied upon [the] likelihood [of receiving relief under former Section 212(c)] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

For two reasons, this case is fundamentally different from *St. Cyr*. First, *St. Cyr* was grounded on the notion that, because a substantial number of aliens had based their decision to plead guilty on the continued availability of Section 212(c) relief, their guilty pleas gave rise to reasonable reliance interests and expectations in preserving eligibility for that relief. For that reason, a substantial majority of the courts of appeals have recognized that the holding of *St. Cyr* generally does not extend to aliens who were convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 519-520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *Kellermann* v. *Holder*, 592 F.3d 700, 705-706 (6th Cir. 2010); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008); *Saravia-Paguada* v. *Gonzales*, 488 F.3d 1122, 1131-1134 (9th Cir. 2007), cert. denied, 553 U.S. 1064 (2008); *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir.

2006); *Ferguson* v. *United States Att'y Gen.*, 563 F.3d 1254, 1259-1271 (11th Cir. 2009), cert. denied, 130 S. Ct. 1735 (2010); but see *Atkinson* v. *Attorney Gen.*, 479 F.3d 222, 230-231 (3d Cir. 2007); *Lovan* v. *Holder*, 574 F.3d 990, 994 (8th Cir. 2009). Similarly, in regulations issued after notice-and-comment rulemaking, the Attorney General has determined that aliens are ineligible for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h); see 8 C.F.R. 1003.44(a)-(b).

Unlike the elimination of Section 212(c), the application of Section 1101(a)(13)(C) does not depend upon an alien's guilty plea, but only on his underlying criminal conduct. As already explained, an alien who engaged in criminal conduct cannot reasonably claim to have relied on the current state of immigration law in doing so.

Second, the consequence of the elimination of Section 212(c) was to make aliens in St. Cyr's position immediately removable from the United States, without the possibility of discretionary relief that had formerly existed and was frequently granted. See 533 U.S. at 323-324. By contrast, the amendment to Section 1101(a)(13) has no immediate effect on LPRs with prior criminal convictions. Its effect occurs only if those LPRs choose to engage in the post-enactment conduct of leaving the United States and attempting to return, at which point IIRIRA itself provides for discretionary relief for certain aliens. Moreover, an alien may be eligible to seek relief from inadmissibility under former Section 212(c) if he pleaded guilty before the enactment of AEDPA and IIRIRA in the circumstances described in *St. Cyr* and was not otherwise ineligible for a waiver. Petitioner, in fact, applied for Section 212(c) relief but was denied it as a matter of discretion. See p. 5, *supra*. The circum-

stances presented here thus bear no resemblance to the disruption of reliance interests the Court considered in *St. Cyr* in the context of the repeal of Section 212(c)'s discretionary relief from substantive grounds for deportation.

c. Contrary to the suggestion of petitioner (Br. 42) and one of his *amici* (National Immigrant Justice Ctr. Br. 13-15), this case is also unlike *Chew Heong* v. *United States*, 112 U.S. 536 (1884). In *Chew Heong*, the Court held that a statute barring Chinese nationals from reentering the United States without a certificate prepared when they left this country should not be applied to a Chinese national who had left the United States before the statute was passed. At that time, a treaty between the United States and China gave Chinese nationals "the right to go from and return to the United States at pleasure, without being subjected to regulations or conditions affecting the substance of that right." *Id.* at 539. Crucial to the Court's decision was the conclusion that application of the new statute to an alien who had previously left the country would retroactively impair the "rights previously vested" in him, upsetting an obvious reliance interest. *Id.* at 559.

Chew Heong might be relevant here if Section 1101(a)(13)(C) were applicable to LPRs who had left the United States before it was enacted and were caught unawares when, upon their return, they were deemed to be seeking admission. But Section 1101(a)(13)(C) did not take effect until more than six months after IIRIRA was enacted, thus eliminating any possibility that it created such a trap. See IIRIRA § 309(a), 110 Stat. 3009-625; see *Fernandez-Vargas*, 548 U.S. at 45. The unusual facts of *Chew Heong* therefore have no application to this case.

d. The asserted reliance interest in this case is instead similar to the interest that the Court rejected in *Fernandez-Vargas* as insufficient to establish that a statute has retroactive effect. *Fernandez-Vargas* involved Section 305(a)(3) of IIRIRA, which limited the relief available to aliens who had illegally reentered the United States after a prior removal order. 110 Stat. 3009-599. This Court held that the statute was not retroactive as applied to aliens who had reentered before IIRIRA's enactment. 548 U.S. at 33. In so holding, the Court explained that "it is the conduct of remaining in the country after entry," and "not a past act that [the alien] is helpless to undo," "that subjects him to the new and less generous legal regime." *Id.* at 44. The Court emphasized that, after the enactment of IIRIRA but before its effective date, Fernandez-Vargas "had an ample warning that the new law could be applied to him," yet he chose to remain in the country anyway. *Id.* at 45. While acknowledging that leaving the country "would have come at a high personal price," the Court explained that "the branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law." *Id.* at 46. The Court observed that "[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." *Ibid.* (quoting Lon R. Fuller, *The Morality of Law* 60 (1964)) (brackets in original).

Those considerations are equally applicable here. As in *Fernandez-Vargas*, it is post-enactment conduct—in this case, leaving the United States and then attempting to return—that subjects petitioner to the new legal rule. That rule is therefore not retroactive, even if it arguably

upset expectations developed under the old rule. Petitioner observes (Br. 35-36) that the post-enactment conduct in *Fernandez-Vargas* involved a violation of law. That is true but beside the point. What matters is that, like Fernandez-Vargas (but unlike St. Cyr), petitioner did not rely on the prior law as part of a *quid pro quo* with the government, nor were his interests in the continuation of the prior law any "more substantial than inchoate expectations and unrealized opportunities." 548 U.S. at 44 & n.10.

4. Section 1101(a)(13)(C) is intended to regulate future conduct, not past conduct

The conclusion that Section 1101(a)(13)(C) is not retroactive is confirmed by the fact that the activity it operates to regulate here is post-IIRIRA entry into the United States, not pre-IIRIRA conduct that could render an alien removable as a substantive matter. Several Justices suggested in *Landgraf* that the key question in determining the temporal scope of a statute is "what is the relevant activity that the rule regulates." 511 U.S. at 291 (Scalia, J., concurring in the judgment). That inquiry leads to the same conclusion as the analysis of the factors identified in the majority opinion in *Landgraf*: application of the amended version of Section 1101(a)(13) in the circumstances of this case would not have a retroactive effect. Although Section 1101(a)(13)(C)(v) uses pre-IIRIRA events as the basis for treating an alien's post-IIRIRA entry as a request for "admission" to the United States, the application of that provision to post-IIRIRA entries is not retroactive because the text, structure, and legislative history of IIRIRA demonstrate that the "activity the statute was intended to regulate" is post-enactment conduct, not

pre-enactment conduct. *Martin*, 527 U.S. at 363 (Scalia, J., concurring in part and concurring in the judgment).

a. As noted above, Section 1101(a)(13)(C), by its terms, applies only to aliens who have engaged in post-IIRIRA conduct: attempting to enter the United States. And the title of the provision shows that its focus is on regulating the alien's entry, not his earlier conduct. See *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text."). Section 1101 is the "Definitions" section of the INA, and the provision of IIRIRA that amended Section 1101(a)(13), Section 301(a), was entitled "'ADMISSION' DEFINED." IIRIRA § 301(a), 110 Stat. 3009-575. Those section titles confirm that Section 1101(a)(13) is a definitional provision aimed at describing what post-IIRIRA conduct will constitute an admission. See *Tineo* v. *Ashcroft*, 350 F.3d 382, 395 (3d Cir. 2003); *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1064 (B.I.A. 1998) (en banc). It is not aimed at punishing or deterring the alien's earlier criminal conduct.

b. That conclusion is reinforced by the structure of IIRIRA. Section 301(a), in which 8 U.S.C. 1101(a)(13)(C) was enacted, is part of Title III-A of IIRIRA, "Revision of Procedures for Removal of Aliens." 110 Stat. 3009-575. IIRIRA also includes several provisions imposing greater restrictions on criminal aliens, for example, by expanding the definition of "aggravated felony" so as to make more criminal aliens removable," IIRIRA § 321, 110 Stat. 3009-627; by authorizing the imposition of registration requirements on aliens on probation or parole, IIRIRA § 323, 110 Stat. 3009-629; and by providing for enhanced penalties for certain immigration offenses, IIRIRA § 334, 110 Stat.

3009-635. But those provisions are set out in Title *III-B*, "Criminal Alien Provisions." 110 Stat. 3009-627. Section 301(a)'s placement in a different subtitle demonstrates that it is a regulation of the procedures governing admission and removal, not of aliens' past criminal conduct.

Significantly, several of the exceptions identified in Section 1101(a)(13)(C)—that is, the circumstances in which a returning LPR will be deemed to be seeking admission—pertain to conditions that can arise only after the enactment of IIRIRA. For example, Section 1101(a)(13)(C)(ii) provides that an LPR shall be regarded as seeking admission if he or she "has been absent from the United States for a continuous period in excess of 180 days." That provision did not take effect until more than 180 days after IIRIRA's enactment, so it can apply only to LPRs who have "been absent from the United States" after the enactment of the statute. See IIRIRA § 309(a), 110 Stat. 3009-625. Similarly, Section 1101(a)(13)(C)(vi) applies to any LPR who "is attempting to enter at a time or place other than as designated by immigration officers." Under that provision, the circumstance subjecting the LPR to the requirement of seeking admission—the attempted entry—necessarily post-dates the statute's enactment. Those provisions confirm that the overall purpose of Section 1101(a)(13) is to regulate future admissions to the United States, not past activity by aliens.

c. That understanding is further confirmed by IIRIRA's legislative history. The principal purpose of Section 301(a) of IIRIRA was "to replace certain aspects of the * * * 'entry doctrine,' under which illegal aliens who have entered the United States without inspection gain[ed] equities and privileges in immigration proceed-

ings that [were] not available to aliens who present themselves for inspection at a port of entry." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 225 (1996) (House Report). The statute accomplishes that purpose by defining "admission" as a "lawful entry" after inspection. 8 U.S.C. 1101(a)(13)(A). The House Report accompanying the initial version of the bill that became IIRIRA explained that Section 301(a) would also "preserve[] a portion of the *Fleuti* doctrine" while making some changes to it, but the changes did not include the provision that became Section 1101(a)(13)(C)(v). House Report 225. That provision was added by the Conference Committee; its report noted the change but said nothing to suggest that its aim was any different from that of the other provisions of Section 1101(a)(13)—that is, the regulation of admission, not of past criminal conduct by aliens. H.R. Rep. No. 828, 104th Cong., 2d Sess. 207 (1996). Because the conduct that Congress sought to regulate is conduct occurring after the enactment of IIRIRA, application of the statute is not retroactive.

C. There Is No Basis For Applying A Canon Of Construing Ambiguity In Immigration Statutes In Favor Of Aliens

Petitioner invokes (Br. 52-53) the "principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Petitioner correctly notes that this Court relied on that principle in *St. Cyr*, but its application there was limited to step one of the *Landgraf* retroactivity analysis. 533 U.S. at 320 (reasoning that *Cardoza-Fonseca* "forecloses the conclusion that, in enacting" IIRIRA's effective-date provision, "'Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is

an acceptable price to pay for the countervailing benefits'") (quoting *Landgraf*, 511 U.S. at 272-273); but see *Fernandez-Vargas*, 548 U.S. at 40 (rejecting a similar argument based on *Cardoza-Fonseca*). In this case, there is no need to invoke *Cardoza-Fonseca* at step one because *St. Cyr* already establishes that Congress has not expressly specified the temporal reach of provisions enacted in Section 301(a) of IIRIRA. See 533 U.S. at 320.

Cardoza-Fonseca has no relevance to step two of the *Landgraf* analysis. At that step, the Court asks "whether the new statute would have a retroactive effect." *Landgraf*, 511 U.S. at 280. Answering that question does not call for resolving ambiguity in the statutory text; rather, it requires examining the application of the statute to determine whether its effect is retroactive. There is accordingly no reason to apply *Cardoza-Fonseca* or any similar rule of construction in this case. Cf. *St. Cyr*, 533 U.S. at 320-321 n.45.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2011

APPENDIX

1. 8 U.S.C. 1101(a)(13) provides:

Definitions

(a) As used in this chapter—

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

2. 8 U.S.C. 1101(a)(13) (1994) provided:

Definitions

(a) As used in this chapter—

(13) The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

3. 8 U.S.C. 1182(a)(2) (2006 and Supp. IV 2010) provides:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional

institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of Title 21), or is or has been a knowing aider, abettor, assister, conspir-

ator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

4. 8 U.S.C. 1182(c) (1994) provided:

Excludable aliens

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an

alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

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ERIC H. HOLDER, JR.,
Attorney General,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTRODUCTION

When Panagis Vartelas, a lawful permanent resident, pleaded guilty in 1994 to counterfeiting, he retained the ability to take brief trips abroad without being denied reentry upon his return. The government concedes that Congress did not expressly mandate retroactive application of newly enacted INA § 101(a)(13)(C)(v). Resp't Br. 11. It nevertheless claims that when that subsection took effect in 1997, it effectively eliminated Mr. Vartelas's prior ability to take brief trips abroad without risk of being denied reentry. Under IIRIRA, he faced removal proceedings and the prospect of permanent exile upon his return from foreign travel. Applying the newly enacted statute in that way would be impermissibly retroactive, for four reasons.

First, the subsection does not simply restrict post-IIRIRA entries. It virtually eliminates lawful permanent residents' ability to travel abroad without risk of being denied reentry, based solely on pre-IIRIRA conduct. That conduct now makes them removable upon their return. Thus, unless they receive favorable exercises of discretion, traveling abroad means facing permanent exile from their homes here. *Second*, § 101(a)(13)(C)(v) need only attach a new disability or impose a new penalty based on a pre-IIRIRA offense in order to be retroactive. In response, the government attacks a straw man, denying that this case involves vested rights while admitting that Mr. Vartelas never makes that argument. Resp't Br. 20-25. *Third*, Mr. Vartelas's return to his home in the

United States is in no way unlawful. Applying IIRIRA retroactively would add a new burden to penalize his pre-IIRIRA offense, not his post-IIRIRA travel. While the post-IIRIRA travel is the trigger, the pre-IIRIRA offense is the target. *Fourth*, reliance is not a prerequisite to retroactivity, as the government appears to concede. Resp't Br. 25-26. Nevertheless, lawful permanent residents like Mr. Vartelas reasonably relied on pre-IIRIRA law in pleading guilty, and applying the statute retroactively upsets that reliance. Particularly given the canon of construing ambiguities in favor of lawful permanent residents, § 101(a)(13)(C)(v) cannot apply to offenses that predated IIRIRA.

I. This Case Involves Lawful Foreign Travel by Lawful Permanent Residents, Not Merely, As the Government Argues, Regulation of Entries

The stakes here are high. They involve lawful permanent residents' pre-existing ability to take brief trips abroad, not just entries by newly arriving aliens. Lawful permanent residents like Mr. Vartelas put down roots here: they marry, buy houses, raise families, and establish careers here. They have weighty interests in not being "banish[ed] or exile[d]" from their established homes. *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1484, 1486 (2010) (internal quotation marks omitted). Thus, when lawful permanent residents return from brief trips abroad, they are entitled to greater due process safeguards than newly arriving aliens in order to protect their stronger ties to this

country. *Landon* v. *Plasencia*, 459 U.S. 21, 32-33 (1982). "[A]n alien on the threshold of initial entry stands on a different footing" from ones "who have once passed through our gates." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212-14 (1953).

Before IIRIRA, the ability to travel briefly and return was an integral part of lawful permanent residents' settled expectations. *See* Asian Am. Justice Ctr. et al. Br. 16-23; NACDL et al. Br. 16-18, 23-25. Under the pre-IIRIRA statute, they were free to come and go briefly without being treated as new applicants for admission. *Rosenberg* v. *Fleuti*, 374 U.S. 449, 462 (1963). They could attend family weddings and funerals and visit aged or sick parents abroad without risk of having to abandon their spouses and children here. As *Fleuti* recognized, brief trips abroad should not be "regarded as meaningfully interruptive of the alien's permanent residence" in the United States. *Id.* at 462. Now, however, lawful permanent residents like Mr. Vartelas are treated as arriving aliens and may face many months of "unreviewable, no-bond detention" and removal proceedings upon return. Asian Am. Justice Ctr. et al. Br. 10-16. IIRIRA effectively eliminates their ability to travel abroad without being treated as arriving aliens upon their return.

The government frames the issue far too narrowly. It claims the statute "in no way restricts petitioner's ability to travel abroad," as anyone can leave on a one-way ticket as long as he does not care about making a round trip. Resp't Br. 20. According to the

government, the only conduct regulated is "the post-[IIRIRA] conduct of attempting to enter the United States." *Id.* at 14. But for lawful permanent residents, one cannot divorce the outbound trip from the return. IIRIRA eliminates their entitlement to return, so any travel abroad can trigger permanent exile. If applied here, § 101(a)(13)(C)(v)'s primary effect would be on a lawful permanent resident's ability to travel abroad briefly, not merely on his reentry once the trip ends. The issue is not restricting post-IIRIRA entries, but revoking the ability to travel without risk of being denied reentry, based on a pre-IIRIRA offense.

II. INA § 101(a)(13)(C)(v) Would Attach a New Disability and Impose a New Penalty Based on Pre-IIRIRA Offenses, Regardless of Whether There Is a Vested Right to Travel

Applying § 101(a)(13)(C)(v) to Mr. Vartelas runs afoul of Justice Story's classic test for retroactivity, which continues to guide this Court's analysis:

> [E]very statute, which
>
> [1] takes away or impairs vested rights acquired under existing laws,
>
> *or* [2] creates a new obligation,
>
> [3] imposes a new duty,
>
> *or* [4] attaches a new disability,
>
> in respect to transactions or considerations already past,
>
> must be deemed retrospective. . . .

Soc'y for the Propagation of the Gospel v. *Wheeler*, 22 F. Cas. 756, 767 (Story, Circuit Justice, C.C.D.N.H. 1814) (No. 13,156) (line breaks, indentation, emphases, and bracketed numbers added). The government spends five pages arguing that the first category – vested rights – does not apply. Resp't Br. 20-25. But that is beside the point. As the government admits, Mr. Vartelas never claims that he had a vested right. *Id.* at 21.

Likewise, Congress's plenary power over entry (Resp't Br. 21-22) does not justify retroactivity. *St. Cyr* found another provision of IIRIRA impermissibly retroactive because it abolished discretionary relief for lawful permanent residents, even though it too involved Congress's plenary power over immigration. The question is not whether Congress *can* restrict reentry retroactively, but whether it *has* done so with "unmistakable clarity." *INS* v. *St. Cyr*, 533 U.S. 289, 318, 325 n.55 (2001).[1]

---

[1] The statutory text reflects Congress's intent to make INA § 101(a)(13)(C)(v) prospective only, but the government resists this conclusion. Pet'r Br. 20 n.3; Resp't Br. 11-13. Its premise is that people granted relief under former INA § 212(c) must have their waivers "examined again" when they travel. Resp't Br. 13. The statute conflicts with that premise. Lawful permanent residents who received relief under former § 212(c) are statutorily ineligible for § 240A(a) relief. INA § 240A(c)(6), 8 U.S.C. § 1229b(c)(6). That bar reflects Congress's understanding that former § 212(c) relief would remain effective and would not need to be re-litigated. The Department of Homeland Security and the Board of Immigration Appeals (BIA) likewise reject the Solicitor General's interpretation of the statute: "Once an application [for former

(Continued on following page)

As this Court has noted, "we do not restrict the presumption against statutory retroactivity to cases involving 'vested rights.'" *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 275 n.29 (1994). Justice Story's list is disjunctive, describing four alternative categories separated by "or." It enumerates "several '*sufficient*,' as opposed to '*necessary*,' conditions for finding retroactivity." *St. Cyr*, 533 U.S. at 321 n.46 (quoting *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 947 (1997) (emphases in original)); *see also Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 n.10 (2006). This Court has repeatedly found retroactivity where statutes did not affect vested rights but added penalties even for previously *unlawful* conduct. The defendant in *Landgraf* had no vested right to engage in employment discrimination, which had been illegal for decades, but increasing the penalty was nonetheless retroactive. 511 U.S. at

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§ 212(c) relief] is approved, that approval is valid indefinitely" as to "those specific grounds of excludability" waived. 8 C.F.R. § 212.3(d). Thus, "once a waiver of excludability or deportability for a certain act [is] granted, that waiver would remain effective for all subsequent entries." *In re Balderas*, 20 I. & N. Dec. 389, 392 (BIA 1991).

The government also notes that INA § 212(h) waivers predate IIRIRA. Br. 12. But they also postdate IIRIRA, so Congress needed to prescribe rules for travelers who obtained § 212(h) relief after IIRIRA. Congress's failure to mention any comparable rule in § 101(a)(13)(C)(v) for travelers granted § 212(c) relief makes sense only if Congress believed that § 101(a)(13)(C)(v) would not apply to persons granted § 212(c) relief, because they would have been convicted before IIRIRA's passage.

282 & n.35. Likewise, Hughes Aircraft had no vested right to submit false claims to the government, but broadening its liability and abolishing a defense were retroactive changes. 520 U.S. at 947-48. Here, § 101(a)(13)(C)(v) would be retroactive not because it would impair a vested right, but because it would attach a new disability and impose a new penalty based on pre-IIRIRA offenses.

1. The subsection would attach a new disability to lawful permanent residents' pre-IIRIRA ability to travel abroad. Pet'r Br. 25-26. A disability is "[t]he inability to perform some function." BLACK'S LAW DICTIONARY 528 (9th ed. 2009); *accord* OXFORD ENGLISH DICTIONARY 713 (2d ed. 1989) ("Want of ability (to discharge any office or function); inability, incapacity, impotence."). As Professor Hohfeld explained nearly a century ago, a disability is the opposite not of a right, but of an ability or power to take some action. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30, 44 (1913). Until IIRIRA, lawful permanent residents enjoyed the ability to take brief trips abroad without risk of being denied reentry. If applied here, IIRIRA would revoke that ability based on a pre-IIRIRA offense.

The crux of the government's argument is that because removal is triggered by a post-IIRIRA entry, § 101(a)(13)(C)(v) operates only prospectively. Resp't Br. 15-20. But, by definition, a disability removes someone's ability to perform some action in the

future, after the disability is imposed. The government's argument would render Justice Story's fourth category toothless, as the essence of a disability is removing the ability to do something in the future.[2]

For the disability category to remain meaningful, it must protect the ability to engage in lawful future actions against new burdens based on unlawful pre-enactment actions. Apart from invoking Congress's plenary power, the government does not even attempt to rebut Mr. Vartelas's argument based on the new disability. *Compare* Resp't Br. 20, *with* Pet'r Br. 3, 15, 25, 27, 28, 30-32, 36, 39. It cannot deny that applying the subsection to such cases attaches a new disability to lawful permanent residents' ability to travel abroad.

2. Subsection 101(a)(13)(C)(v) would also add a new penalty to Mr. Vartelas's pre-IIRIRA offense. Pet'r Br. 23-25. *Landgraf*'s retroactivity test includes civil penalties as well as criminal punishments. "As our cases make clear, the presumption against retroactivity applies far beyond the confines of the criminal law." *St. Cyr*, 533 U.S. at 324; *see also Landgraf*, 511 U.S. at 283-84. Though the government tries to

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[2] Likewise, the verb tense of § 101(a)(13)(C), which defines which lawful permanent residents "shall not be regarded as seeking an admission," reveals only that judges will make these determinations after IIRIRA's enactment. It tells us nothing about whether the law's burden targets a past act. *Contra* Resp't Br. 16-17.

limit the category of impermissible retroactive penalties to criminal punishments, *Hughes Aircraft* and *Landgraf* were civil-damages cases. *Compare* Resp't Br. 17, 22, *with* 520 U.S. at 947-48 *and* 511 U.S. at 282-84. And though the government defends deportation as an inherently prospective exercise of Congress's plenary power, *St. Cyr* rejected that very argument as a justification for retroactivity. *Compare* Resp't Br. 22 (quoting *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)), *with* 533 U.S. at 324 (rejecting the "inherently prospective" argument and distinguishing *Lopez-Mendoza*, 468 U.S. at 1038).

At the time of his conviction, the penalties imposed on Mr. Vartelas were four months' incarceration plus two years' supervised release. AR 310-311. He completed serving that sentence. His guilty plea and conviction did not affect his pre-IIRIRA ability to take brief trips abroad without being treated as an arriving alien upon his return. Under the court of appeals' decision, however, IIRIRA adds a new penalty to his conviction – even brief, lawful travel abroad now makes him removable. Pet'r Br. 23-25.[3]

3. The government argues that Mr. Vartelas "might well have" been "inadmissib[le] even under *Fleuti*" because of the alleged frequency and duration of his foreign travel. Resp't Br. 25. That is irrelevant to the retroactivity question presented here. The

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[3] Mr. Vartelas assumes *arguendo* that IIRIRA abrogated the *Fleuti* doctrine. *Contra* AILA Br. 2-19.

resolution of the retroactivity question does not depend on whether Mr. Vartelas or any particular lawful permanent resident could in fact satisfy the *Fleuti* criteria under pre-IIRIRA law.[4] This Court should resolve the question presented, not apply pre-existing law to the particular facts of this case.

In any event, Mr. Vartelas would likely prevail under *Fleuti* on remand. Pet'r Br. 27 n.5. The government's factual assertions are contested, the testimony was confused on the number of months spent abroad, and the immigration judge neither applied *Fleuti* nor made the factual findings necessary to do so. AR 111-12. If this Court agrees with Mr. Vartelas on the question presented, the appropriate course will be to allow the immigration judge in the first instance to apply *Fleuti*, just as this Court did in *Fleuti* itself. 374 U.S. at 463.

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[4] The government also argues that Congress's passage, six months before IIRIRA, of another statute that made deportable certain aliens who were in a position somewhat similar to Mr. Vartelas's somehow has something to do with the retroactivity of § 101(a)(13)(C)(v). Resp't Br. 23-24. (Oddly, the government also relies on a 2005 case that was overruled in 2011 for the proposition that Mr. Vartelas was deportable when he traveled in 2003. *Id.*) It is sounder, however, to conclude that Congress intended the persons deportable under the other statute to be deported, but that normal retroactivity principles would govern IIRIRA's application to those, like Mr. Vartelas, who were *not* so deported nor made deportable.

III. Subsection 101(a)(13)(C)(v) Targets the Pre-IIRIRA Offense, Not the Innocent Post-IIRIRA Travel Abroad

1. Determining whether IIRIRA attaches a new disability or adds a new penalty "demands a *commonsense, functional* judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-58 (1999) (emphasis added) (quoting *Landgraf*, 511 U.S. at 270). The government contends that the law has no retroactive effect because the triggering event occurs only when lawful permanent residents "make a post-IIRIRA attempt to enter the United States." Resp't Br. 19. But as the government acknowledges, the actual effect of "restricting [Mr. Vartelas's] ability to reenter" the United States is to "force him to choose between maintaining his residence in the United States and visiting his family in Greece." *Id.* at 20. As a commonsense, functional matter, that change in the law saddles Mr. Vartelas with a new disability based on a past offense: it essentially disables him from traveling abroad without becoming removable, as he was able to do before IIRIRA. And it harms him regardless of which course he chooses: forgoing travel to see his parents, or traveling and facing removal upon return.

Under the court of appeals' interpretation, IIRIRA forces lawful permanent residents with pre-IIRIRA convictions to make excruciating *new* choices between visiting ailing relatives abroad and remaining with their spouses and children within the United

States. *See* Asian Am. Justice Ctr. et al. Br. 7-8, 19-20, 22-23 (collecting stories). Indeed, "loss of the ability to travel is itself a devastating retroactive effect." *Id.* at 3. If they do travel, they face a different set of rules that makes them removable and subject to prolonged, unreviewable detention. *Id.* at 10-16. The law penalizes both those who remain in the United States and those who do not.

The commonsense, functional analysis requires "a process of judgment concerning . . . the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270. Brief round-trip travel is a perfectly innocent act that does not disrupt the status quo of Mr. Vartelas's permanent residence here. *Fleuti*, 374 U.S. at 461-62. The driving force behind the new disability and penalty is conviction of a pre-IIRIRA offense, which Mr. Vartelas is now powerless to undo. While the trigger is an innocent post-IIRIRA return home, the target is a pre-IIRIRA offense.

2. Subsection 101(a)(13)(C)(v) likewise qualifies as retroactive under Justice Scalia's approach in *Landgraf*, which asks "what is the relevant activity that the rule regulates." *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring in the judgment); Pet'r Br. 32-34 & n.8. That calls for "an objective appraisal of the impact of the change" rather than an inquiry into the legislature's "subjective motivation." *Lynce* v. *Mathis*, 519 U.S. 433, 442-43 (1997); *see also St. Cyr*, 533 U.S. at 320-21, 324-25 & n.55. The government thus errs in citing committee reports, especially since those

reports concerned older bills that Congress never passed, neither of which contained this particular subsection. Resp't Br. 40.[5]

The government also notes that two other subsections in § 101(a)(13)(C) govern only post-IIRIRA conduct or misconduct. Resp't Br. 39. But at least three subsections refer to earlier misconduct, and five of the six depend upon a finding of some form of misconduct. Pet'r Br. 32-33 & n.7. Moreover, five of them look to conduct beyond the entry itself. Under most of the subsections, including the one at issue here, neither the outbound nor the return trip is the relevant event. The statute targets misconduct distinct from the foreign travel itself. At most, the return from travel abroad is a convenient occasion to screen for past wrongs for those who are deportable.

3. The government does not dispute that Mr. Vartelas's foreign travel was completely lawful. Resp't Br. 20. Yet it strains to analogize this case to cases involving *crimes*. It quotes *ex post facto* cases that focus on "a crime already consummated" or "crimes that have already been committed" or "a criminal prohibition [expanded] after the act is done." Resp't Br.

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[5] *Cf.* Pet'r Br. 33 n.8 (contrary enactment history). While many of those criminal-alien provisions are in Title III-B of IIRIRA (Resp't Br. 38-39), several, including the subsection at issue here, are in Title III-A. *E.g.*, IIRIRA § 304(a)(3), (c). But it is doubtful whether such intent-based factors can ever be strong enough to overcome the canon of construing immigration statutes in favor of lawful permanent residents.

18 (quoting *Cal. Dep't of Corr.* v. *Morales*, 514 U.S. 499, 505 (1995) and *Collins* v. *Youngblood*, 497 U.S. 37, 49 (1990)) (internal quotation marks omitted). Those cases cut in favor of Mr. Vartelas, as his post-IIRIRA travel was lawful and his offense predated IIRIRA.

Similarly, the government's RICO example requires "that an *act of racketeering* occurred after the section's effective date." Resp't Br. 18 (quoting *United States* v. *Brown*, 555 F.2d 407, 417 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978)) (emphasis added and omitted and internal quotation marks omitted). "[R]acketeering" within the meaning of 18 U.S.C. § 1962(c) requires proof of a statutorily enumerated crime, whereas § 101(a)(13)(C)(v) does not depend on the commission of a crime "after the section's effective date."

Likewise, lower courts have upheld applying felon-in-possession-of-a-firearm laws to defendants with pre-enactment convictions because "possession of a firearm" is "prohibited conduct." *United States* v. *Pfeifer*, 371 F.3d 430, 436 (8th Cir. 2004); Resp't Br. 19. As this Court has emphasized, there are well-known, "longstanding prohibitions on the possession of firearms by felons." *District of Columbia* v. *Heller*, 554 U.S. 570, 626 (2008). Unlike foreign travel, gun possession by felons is inherently dangerous conduct that legislatures have long treated as a crime.

The government's examples all require proof of post-enactment *crimes* to invoke new penalties. They

are analogous to recidivism sentencing enhancements for future crimes, which are permissible. "[T]he enhanced punishment imposed for the later offense 'is not to be viewed as . . . [an] additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one.'" *Witte* v. *United States*, 515 U.S. 389, 400 (1995) (quoting *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948)). Here, by contrast, there is no "aggravated . . . repetitive" offense or indeed any post-IIRIRA offense at all. Mr. Vartelas's travel abroad and return are innocent acts, burdened only because of his pre-IIRIRA offense.

4. Finally, the government relies on *Fernandez-Vargas* for the proposition that removal is prospective simply because it is triggered by Mr. Vartelas's return from post-IIRIRA travel. Resp't Br. 17, 36-37. The government stresses the superficial similarity that Messrs. Fernandez-Vargas and Vartelas both "le[ft] the United States and then attempt[ed] to return" post-IIRIRA. *Id.* at 36. It misreads *Fernandez-Vargas*'s holding as turning on the lack of a vested right or *quid pro quo*, as opposed to the ongoing crime. *Id.* at 37. And it selectively quotes phrases discussing the alien's "conduct of remaining in the country after entry" and "the alien's choice" "after the effective date of the new law," "not a past act that [the alien] is helpless to undo." *Id.* at 17, 36 (quoting *Fernandez-Vargas*, 548 U.S. at 44 (internal quotation marks omitted)).

The government quotes those snippets out of context. The full passage reads:

> Thus, it is the conduct of remaining in the country after entry that is the predicate action; the statute applies to stop *an indefinitely continuing violation* that the alien himself could end at any time by voluntarily leaving the country. It is therefore the alien's choice *to continue his illegal presence, after illegal reentry* and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.

548 U.S. at 44 (emphases added). Missing from the government's account is any explanation of how the italicized phrases could apply here. Mr. Fernandez-Vargas faced no "new disability" because his "illegal presence," which had been illegal all along, was a "continuing violation." *Id.* at 45. He could enjoy no "right to continue illegal conduct indefinitely" because his "lawbreaking [wa]s continuous," so "the United States was entitled to bring that continuing violation to an end." *Id.* at 46 & n.13.

Here, by contrast, Mr. Vartelas's post-enactment conduct was completely lawful. IIRIRA imposes a new disability on his lawful travel based on his *pre-IIRIRA* offense. He is a lawful permanent resident, not an illegal alien charged with illegal reentry. Neither his departure nor his return is analogous to

Mr. Fernandez-Vargas's continuing commission of an ongoing crime.

IV. Reliance Is Not Required, But Its Presence in Cases Like This One Makes the Retroactive Effect Even More Obvious and Severe

A. Reliance on Pre-Existing Law Is Not Necessary

A litigant need not prove reliance on prior law for a court to conclude that a statute is retroactive. As the government concedes, "th[is] Court has not required a party challenging the application of a statute to show that he was subjectively aware of the prior law and relied on it in structuring his conduct." Resp't Br. 25-26. Nor could the government insist on a reliance requirement, given this Court's repeated findings of retroactivity in cases involving no reliance. *Hughes Aircraft*, 520 U.S. at 947-48; *Landgraf*, 511 U.S. at 282 & n.35; Pet'r Br. 37-38. While *St. Cyr* recognized that lawful permanent residents' reliance in deciding to plead guilty sufficed to show "an obvious and severe retroactive effect," it made clear that such reliance was not necessary to establish impermissible retroactivity. *St. Cyr*, 533 U.S. at 325; Pet'r Br. 38-39.[6] Instead, the government and Mr. Vartelas

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[6] The government's other citations (Resp't Br. 26) are likewise inapposite. *See Judulang* v. *Holder*, 132 S. Ct. 476, 489 n.12 (2011) (finding no retroactivity problem "[b]ecause we find the BIA's prior practice so unsettled" that it did not amount to "a legal rule" that was retroactively changed; mentioning reliance

(Continued on following page)

agree that the likelihood and reasonableness of reliance are "significant factors" but not indispensable ones. Resp't Br. 26.

This Court therefore need not consider reliance; the preceding arguments suffice to resolve this case. But strong reliance interests, as discussed below, make the retroactive effect especially "obvious and severe." *St. Cyr*, 533 U.S. at 325.

B. Many Lawful Permanent Residents Reasonably Relied on the *Fleuti* Doctrine in Deciding to Plead Guilty

The government does not dispute that here, as in *St. Cyr*, many lawful permanent residents pleaded guilty in reliance on the state of immigration law at the time. 533 U.S. at 322, 325 n.55; Pet'r Br. 40-45. "There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *St. Cyr*, 533 U.S. at 322. In exchange for surrendering their constitutional rights and prospects of acquittal, defendants agree to accept known immigration consequences as well as sentences. *Id.* at 322-23. Retaining the ability

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in dictum); *Republic of Austria* v. *Altmann*, 541 U.S. 677, 694-96 (2004) (not resting on *Landgraf*, but resolving case "[i]n this *sui generis* context" based on Foreign Sovereign Immunities Act); *cf. Fernandez-Vargas*, 548 U.S. at 38 n.6 (distinguishing *Altmann* as "turn[ing] on the peculiarities of the Foreign Sovereign Immunities Act").

to travel and return under pre-IIRIRA law is an important immigration consequence that reasonably influences lawful permanent residents' decisions to plead guilty. NACDL et al. Br. 16-18, 23-25.

Knowledge of immigration consequences is so central to guilty pleas that providing it is part of criminal defense counsel's professional obligations. The Sixth Amendment requires defense counsel to warn non-citizen criminal defendants of the possible immigration consequences of their pleas. *Padilla*, 130 S. Ct. at 1482-83, 1486; NACDL et al. Br. 19-21. Knowledge of immigration consequences enables lawyers to craft plea agreements to limit immigration consequences. *Padilla*, 130 S. Ct. at 1486. For example, defense counsel can explore charge bargains that would avoid depriving their clients of their ability to travel. NACDL et al. Br. 21-22. Had Mr. Vartelas known that his conviction would later make him removable upon his return from foreign travel, he could have sought to plead guilty instead to possessing counterfeit securities, which is not a crime involving moral turpitude. 18 U.S.C. § 474; *In re Lethbridge*, 11 I. & N. Dec. 444, 445 (BIA 1965); NACDL Br. 22. In 1994, he had no reason to anticipate that this distinction would someday be dispositive under a future statute.

The government struggles in vain to distinguish *St. Cyr* from this case. It notes that the repeal of former INA § 212(c) eliminated the possibility of discretionary relief for immigrants who were immediately deportable. Resp't Br. 34. It claims that INA

§ 101(a)(13)(C)(v), by contrast, "has no immediate effect on [lawful permanent residents] with prior criminal convictions" until they choose to travel abroad and return. *Id.*

Actually, Mr. Vartelas's case is a clearer example of retroactivity than *St. Cyr*. Former § 212(c) authorized only a possibility of discretionary relief, whereas prior law here guaranteed that lawful permanent residents could take brief trips abroad without risking exclusion upon return. The prior law here thus provided a firmer foundation for reliance.

Since lawful permanent residents were entitled to return if they met the *Fleuti* criteria, it is immaterial that they remain eligible for discretionary relief even after *Fleuti*'s abrogation. *Contra* Resp't Br. 34-35. Just as there is a "clear difference . . . between facing possible deportation and facing certain deportation," there is a clear difference between automatic return and a discretionary, uncertain chance of overcoming inadmissibility. *St. Cyr*, 533 U.S. at 325; Pet'r Br. 44 n.10. Here, for example, since Mr. Vartelas was denied discretionary relief, he will be treated as a newly arriving alien and removed from this country if INA § 101(a)(13)(C)(v) applies to him. If it does not apply, and he satisfies *Fleuti*'s criteria, he will not have made an entry triggering inadmissibility and will remain a lawful permanent resident. The difference is stark.

C. IIRIRA Upsets Reliance Interests in the Conviction, Not Just Commission, of Crimes Involving Moral Turpitude

1. If applied retroactively, INA § 101(a)(13)(C)(v) would upset lawful permanent residents' reasonable reliance on the laws in effect when they decided to plead guilty. As the government and the court of appeals noted, that subsection does not explicitly require proof of a conviction or guilty plea. Br. 28-29, 31; Pet. App. 24-25. The government, however, must prove by clear and convincing evidence that an applicant is seeking admission, so documents based on mere probable cause (such as arrest warrants or indictments) do not suffice. *Compare* Resp't Br. 28 (citing two cases for the proposition that an arrest warrant or indictment is sufficient proof), *with In re Rivens*, 25 I. & N. Dec. 623, 625-26 & n.4 (BIA 2011) (requiring proof by clear and convincing evidence and rejecting one of the cases cited by the government). Customs and border patrol officers ordinarily question the returning lawful permanent resident, scan his passport into their computers, and discover a record of conviction. TRAC Immigration, Immigration Inspections When Arriving in the U.S., http://trac.syr.edu/immigration/reports/142 (last visited Dec. 27, 2011). Thus, the government routinely uses the conviction, usually obtained by guilty plea, to prove commission of an offense. *See* Resp't Br. 27 (not disputing this point).

The point is not that guilty pleas are indispensable to proving prior offenses, nor that lawful permanent

residents have "a legitimate reliance interest in whatever practical impediments" there are to proving offenses. Resp't Br. 27, 31. Rather, when Congress enacted IIRIRA, it was well established that lawful permanent residents routinely considered immigration consequences and relied on the pre-existing statute (and *Fleuti*) in deciding to plead, just as they did in *St. Cyr*. Pet'r Br. 47-48; Resp't Br. 33 (acknowledging this as *St. Cyr*'s premise). Before IIRIRA, pleading guilty to a crime involving moral turpitude could preserve the ability to travel abroad without risk of being denied reentry; afterwards, a guilty plea would usually eliminate that ability. These reliance interests deserve respect regardless of whether particular sections of IIRIRA were tied to proof of conviction or commission of an offense. Of course, Congress *could have* changed the law to affect those who had already pleaded guilty, but courts may not presume that Congress would have wanted to vitiate such substantial reliance interests.

2. In addition to the dispositive non-reliance considerations and the practical reliance interests discussed above, the statutory structure respects reliance interests in the conviction and not just commission of offenses. INA § 101(a)(13)(C)(v)'s test for "seeking an admission" cross-references and works in tandem with INA § 212(a)(2)'s test for inadmissibility. The Board of Immigration Appeals reads these two subsections as coextensive. Pet'r Br. 48-49. In *Rivens*, the BIA held that having placed the burden of proof on the government under § 101(a)(13)(C)(v), it did not

need to decide separately which party bears the burden under § 212(a)(2)(A)(i)(I). 25 I. & N. Dec. at 626-27. Put another way, if a lawful permanent resident is seeking an admission under the former subsection, he is also inadmissible under the latter one because the former subsection "coincides with" the latter one. *Id.* Subsection 101(a)(13)(C)(v) presupposes that the government will prove commission by adducing clear and convincing evidence of the conviction or admission required by § 212(a)(2)(A)(i)(I). Thus, those who are proven to be seeking an admission are likewise proven inadmissible.

The government does not dispute that *Rivens*, as a published three-judge ruling of the BIA, is entitled to *Chevron* deference. Pet'r Br. 49. But it claims that the BIA did not reach "a general conclusion about the meaning of the statute." Resp't Br. 31-32. That is incorrect. *Rivens* resolved the relationship between seeking an admission and inadmissibility in the context of crimes involving moral turpitude, the very category at issue here. The BIA treats seeking an admission and inadmissibility as two sides of the same coin. The government's submission here, that Congress meant § 101(a)(13)(C)(v) to cast a broader net to screen lawful permanent residents who were not in fact inadmissible, conflicts with the BIA's reading. Resp't Br. 29.

In response, the government points to a different subsection. Under INA § 101(a)(13)(C)(ii), the government notes, an absence of more than 180 days triggers seeking an admission, even though absence

is not *per se* a ground of inadmissibility. Resp't Br. 29-30. Such a long absence may be a trigger because it is often tantamount to abandonment of one's lawful permanent resident status. Pet'r Br. 33 n.7. Regardless, that subsection was not addressed in *Rivens*, and it does not cross-reference INA § 212(a)(2). Subsection 101(a)(13)(C)(v), the one at issue here, is best read as coextensive with § 212(a)(2), which it explicitly cross-references.

3. *Rivens*'s approach is especially reasonable because it would prevent the absurd results occasioned by the government's reading. As Mr. Vartelas's opening brief explained, § 101(a)(13)(C)(v) requires that certain returning lawful permanent residents be treated as seeking admission if they have *committed* an offense identified in § 212(a)(2). Pet'r Br. 50-51. Yet, under the government's approach, the inadmissibility criteria in some of § 212(a)(2)'s subsections would encompass *more* lawful permanent residents than are covered by § 101(a)(13)(C)(v). The result would be a group of inadmissible aliens who would nonetheless be entitled to return to the United States because they would not be seeking an admission. Pet'r Br. 50-51.

Under the BIA's approach, the two subsections are coextensive; no aliens fall through the cracks. Thus, individuals who are inadmissible under § 212(a)(2) are seeking an admission under § 101(a)(13)(C)(v) and vice versa. The government concedes that, under its approach, some aliens who are inadmissible under § 212(a)(2) would not be seeking an admission and so

could not be excluded from this country. Resp't Br. 30. It tries to defend that conclusion by noting that the several other grounds for inadmissibility likewise do not trigger seeking an admission. *Id.* (citing the health-related grounds in § 212(a)(1) and the security-related grounds in § 212(a)(3)).

That response falls short. In drafting § 101(a)(13)(C)(v), Congress did not cross-reference § 212(a)(1) or (a)(3), instead enforcing those subsections by other means. But it did explicitly cross-reference § 212(a)(2), in order to treat everyone who would be inadmissible under that subsection as seeking an admission. The government's reading would undermine that explicit statutory cross-reference. It is more sensible, and certainly permissible under *Chevron*'s second step, to follow *Rivens*'s reading of § 101(a)(13)(C)(v) as cross-referencing the specific proof of commission required by § 212(a)(2), such as conviction of a crime involving moral turpitude. Pet'r Br. 51.

If any doubt remains, a longstanding canon requires construing the statute in favor of the lawful permanent resident. Pet'r Br. 52-53. There is no reason to limit that canon arbitrarily to *Landgraf*'s first step, as the government suggests. Resp't Br. 40-41 (citing no case imposing such a limitation). Rather, it applies to the entire process of construction "because deportation is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan* v.

Phelan, 333 U.S. 6, 10 (1948). The canon is not a technical tool limited to divining congressional "logic," but a humane safeguard against "trench[ing] on [the lawful permanent resident's] freedom." *Id.*

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Mr. Vartelas's opening brief, this Court should reverse the judgment of the court of appeals and remand for further proceedings.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1211

IN THE

Supreme Court of the United States

PANAGIS VARTELAS,

Petitioner

—v.—

ERIC H. HOLDER, JR.,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208 Stat. 3009-546 1

OTHER AUTHORITIES

Alex Stepick, *God Is Apparently Not Dead, in* IMMIGRANT FAITHS: TRANSFORMING RELIGIOUS LIFE IN AMERICA (Karen I. Leonard, Alex Stepick, Manual A. Vasquez & Jennifer Holdaway eds., 2005) 18

Anthony Lewis, *When It Is Unjust*, N.Y. TIMES, Dec, 26, 1997 13

DANIEL HUANG, ASIAN PAC. AM. LEGAL CTR. OF S. CALIFORNIA, A DEVASTATING WAIT: FAMILY UNITY AND THE IMMIGRATION BACKLOGS (2008) 21

DEP'T OF STATE, ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS IN THE FAMILY-SPONSORED AND EMPLOYMENT-BASED PREFERENCES REGISTERED AT THE NATIONAL VISA CENTER AS OF NOVEMBER 1, 2010 (2011) 21

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HUMAN RIGHTS WATCH, A COSTLY MOVE (2011) 14

Keith Hunsucker, Senior Instructor, Fed. Law Enforcement Training Ctr., *Criminal Without Conviction—Prosecuting the Unconvicted Arriving Criminal Alien Under Section 212(a)(2)(A) of the Immigration and Nationality Act*, 2 Q. REV. (2d ed. 2001) 6

Manuel Orozco, *Transnationalism and Development: Trends and Opportunities in Latin America, in* REMITTANCES: DEVELOPMENT IMPACT AND FUTURE PROSPECTS (Samuel Munzele Maimbo & Dilip Ratha eds., 2005) 22

Mirta Ojito, *Immigrant Fights Off His Deportation*, N.Y. TIMES, Sept. 4, 1998. 13

Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. (2008). 9

NAT'L IMMIGRANT JUSTICE CTR., ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT (2010) 14

Nicole Brodeur, *Caught in the Wheels of Justice*, SEATTLE TIMES, Mar. 14, 2000 16

Peggy Anderson, *Immigrant Faces Deportation Under Tough INS Laws*, OREGONIAN, Feb. 14, 2000 16

Peggy Levitt, GOD NEEDS NO PASSPORT (2007). 18

Peggy Levitt, *Local-Level Global Religion: The Case of U.S.-Dominican Migration*, J. FOR THE SCI. STUDY OF RELIGION (Mar. 1998). 19

R. Stephen Warner, *Religion and New (Post-1965) Immigrants: Some Principles Drawn from Field Research*, AM. STUD. (2000) 17

SEXUAL ABUSE IN IMMIGRATION DETENTION, http://www.aclu.org/sexual-abuse-immigration-detention (last visited Nov. 21, 2011) 14

Simcha Fishbane, *Jewish Mourning Rites—A Process of Resocialization*, ANTHROPOLOGICA (1998). 18

Solomon Alexander Nigosian, ISLAM: ITS HISTORY, TEACHING, AND PRACTICES (2004) 18

Susan Gilmore, *Mother Won't Be Deported After All*, SEATTLE TIMES, Aug. 7, 2002 ..... 15, 16

Susan Gilmore, *Tough INS Law Leaves Family in Turmoil as Trip to Italy Ends in Jail*, SEATTLE TIMES, Feb. 7, 2000 16

Tamyra Howser, *Woman Awaits Deportation Appeal With Fear, Hope: CATCH-22: Reunited With Her Kids, but in Limbo After Tripped Up by Immigration Law*, NEWS TRIBUNE, Jan. 1, 2001 ... 16

U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL ("FAM") (Oct. 10, 2011) 21

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STATEMENT OF INTEREST

Amici curiae are community groups, immigrant justice organizations and legal service providers whose constituents and clients face the consequences of any retroactive repeal of the *Fleuti* doctrine. This doctrine reflected the settled expectation held by longtime lawful permanent residents that they would not be treated as arriving aliens upon return from brief travel abroad. As organizations that work closely with immigrants, their families, and their communities, we have a profound interest in ensuring that their voices are included in the resolution of the legal issue in this case.[1]

This brief presents the stories of community members and clients who began building their lives in this country long before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[2] and who will be touched by the Court's ruling in this case. These stories illustrate that the ruling below imposes harsh new legal consequences on a lawful permanent resident who briefly travels abroad. Indeed, it is as if such an individual returns home from work one day to find that a new lock is on his or her front door. Detailed statements of interest for the *amici* are appended after the conclusion of this brief.

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[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief. Pursuant to Rule 37.3(a), *amici curiae* have filed the letters of consent with the Clerk of the Court.

[2] Pub.L. 104-208, 110 Stat. 3009-546.

SUMMARY OF ARGUMENT

The rule announced below treats longtime lawful permanent residents ("LPRs" or "green card holders") returning from brief trips abroad as strangers in the country they have called home for decades. It thereby exposes them to a legal scheme that long applied only to newcomers. This brief *amici curiae* uses case examples to illustrate the dramatic, real-life implications of retroactively reclassifying longtime LPRs as "arriving aliens" upon their return from short trips abroad.

For decades after *Rosenberg v. Fleuti*, the right of green card holders to take "innocent, casual, and brief" trips abroad was equivalent to that of U.S. citizens.[3] LPRs journeyed abroad to minister to ailing family members, attend funerals of deceased relatives, and maintain family ties. No legal consequences flowed from these trips, nor did losing the ability to travel enter into the plea calculus for an LPR facing a criminal charge.

Nearly forty years after *Fleuti*, LPRs are once again being put into removal proceedings following trips that are in no way "meaningfully interruptive" of their status as permanent residents.[4] Retroactive

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[3] 374 U.S 449, 462 (1963) (finding such travel not "meaningfully interruptive" of LPR status).

[4] *See, e.g., In Re: Ramirez*, 2008 WL 762700 (B.I.A. Mar. 4, 2008) (LPR placed in removal proceedings upon return from fishing trip to Mexico); *In Re: Morgan*, 2005 WL 3833046 (B.I.A. Nov. 16, 2005) (detained and placed in removal proceedings upon return from trip to visit ailing mother); *see also* discussion of Samuel Rivera, *infra* Part II.A (placed in removal proceedings upon return from three-day trip to visit dying mother).

application of any repeal of *Fleuti* subjects longtime LPRs to a legal regime designed to screen newcomers. As a result, LPRs returning from short trips have been exposed to harsh new legal consequences not foreseeable at the time of their pleas: They have been detained without access to bond, put in removal proceedings, and threatened with the loss of "all that makes life worth living."[5]

The government implies that LPRs can simply avoid these retroactive effects by refraining from travel. However, loss of the ability to travel is itself a devastating retroactive effect. For LPRs, international travel is a right of fundamental importance. Without it, they are unable to comply with universally recognized faith-based obligations, such as attending funerals or ministering to sick relatives. Moreover, without travel many LPRs face the threat of permanent separation from relatives living abroad.

ARGUMENT

I. LAWFUL PERMANENT RESIDENTS LIVED UNDER THE SETTLED EXPECTATION THAT THEY WOULD NOT BE TREATED AS NEWCOMERS UPON RETURN FROM BRIEF TRAVEL ABROAD.

Subjecting LPRs with pre-IIRIRA[6] convictions to treatment as "arriving aliens" contravenes settled

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[5] *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

[6] Effective date April 1, 1997.

expectations regarding the bundle of rights accorded LPRs. U.S. immigration law has consistently distinguished between, on the one hand, those longtime residents who have made the United States their home, and on the other, those individuals who arrive at the border seeking to be admitted for the first time. According to the *Fleuti* doctrine, LPRs returning from "brief, innocent, and casual" travel abroad were not reviewed under inadmissibility (then called "excludability") criteria.[7] As a result, in the vast run of cases LPRs were only removable if their convictions constituted grounds of deportability, which were—and are—narrower than the grounds of inadmissibility.[8]

The people harmed by a retroactive repeal of *Fleuti* have long thought of the United States as their permanent home. At the time of their convictions, they had no reason to expect they would later be classified as arriving aliens. For years, they have lived their lives based upon this settled expectation, freely making innocent, casual, and brief trips abroad.

As of 2011, a retroactive application of *Fleuti*'s repeal would *solely* affect LPRs who have resided continuously in the United States for a minimum of fourteen years since IIRIRA.[9] These LPRs developed

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[7] *Fleuti*, 374 U.S at 462 (holding that such travel was not "meaningfully disruptive" of LPR status).

[8] *See infra* Part II.A-B.

[9] *See* discussions of Jerry Arias, *infra* Part III.A, and Jose Velasquez, *infra* III.B (LPRs for over thirty years before being put into removal proceedings); Jesus Collado, *infra* Part II.C (twenty-three years); Samuel Rivera, *infra* Part II.C (twenty-eight years).

strong ties to the United States, reinforcing their expectation that they would not be treated as newcomers.[10] They supported their immediate and extended families in the United States and raised U.S. citizen children.[11] They volunteered in civic organizations and held steady jobs.[12] Some owned and operated their own businesses.[13] Moreover, many of these LPRs were convicted of non-deportable offenses; they lived under the expectation that the consequences of such minimal, stale criminal convictions were behind them.

II. RETROACTIVE APPLICATION OF ANY REPEAL OF *FLEUTI* SUBJECTS LPRS TO HARSH NEW LEGAL CONSEQUENCES.

Retroactive repeal of *Fleuti* subjects LPRs to a variety of harsh new legal consequences by re-categorizing them as arriving aliens upon return from brief, innocent, and casual trips abroad.

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[10] *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.").

[11] *See, e.g.*, discussion of Emma Mendez de Hay and Jesus Collado, *infra* Part II.C; Jerry Arias, *infra* Part III.A.

[12] *See, e.g.*, discussion of Samuel Rivera, *infra* Part II.A.

[13] *See, e.g.*, discussion of Jose Velasquez, *infra* Part III.B.

A. Prior to 1997, a longtime LPR who pled guilty to a single crime involving moral turpitude was not thereby rendered removable.

Prior to IIRIRA, a longtime LPR with a single conviction for a crime in involving moral turpitude ("CIMT") faced no immigration consequences. While a single CIMT constituted a ground of inadmissibility,[14] it generally did not—and still does not—constitute a ground of deportability.[15] This reflected a core principle of the immigration scheme set up by Congress: new immigrants should be subject to stricter standards of entry than LPRs with established lives in the United States. Consistent with this paradigm, under *Fleuti* LPRs were not categorized as arriving aliens upon return from brief, innocent, and casual trips abroad. They were therefore not subject to the stringent grounds of inadmissibility attending that categorization.[16]

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[14] 8 U.S.C. § 1182(a)(2)(A)(i)(I).

[15] 8 U.S.C. § 1227(a)(2)(A)(i)-(ii) (limiting deportability to aliens convicted either of CIMT within five years of admission or of two or more CIMTs).

[16] The new consequences imposed by retroactive application of any repeal of *Fleuti* also extend to mere admissions of certain relatively minor crimes (e.g., a single CIMT or possession of small amount of marijuana) committed prior to 1997. *See* 8 U.S.C. § 1182(a)(2)(A)(i). This situation is not merely hypothetical. Department of Homeland Security ("DHS") officers are trained to question arriving aliens in order to elicit confessions. *See* Keith Hunsucker, Senior Instructor, Fed. Law Enforcement Training Ctr., *Criminal Without Conviction—Prosecuting the Unconvicted Arriving Criminal Alien Under Section 212(a)(2)(A) of the Immigration and Nationality Act*, 2 Q. REV. (2d ed. 2001), *available at*

By retroactively reclassifying LPRs as arriving aliens, the ruling below subjects LPRs who pled guilty to a single pre-IIRIRA CIMT to dramatic new legal consequences, including the risk of detention and deportation.[17]

> **Samuel Rivera** entered the United States as a refugee from Cuba in 1980, and was later accorded LPR status dating back to that year. Since then, he has developed strong ties to the United States. He is married to a U.S. citizen and has U.S. citizen siblings. He has held a steady job in New York for the past eight years and has consistently paid his taxes. Mr. Rivera made two trips to Cuba in 1998 and 2000, each without incident. His third trip, in April 2010, proved to be much different. He went to Cuba for three days to tend to his fatally ill mother, who has since passed away. He left expecting to be able to make the trip again when needed, but was not to be. Upon his return to the United States, he was classified as an arriving alien, charged as inadmissible based on a seventeen-year-old conviction for a non-

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http://www.fletc.gov/training/programs/legal-division/the-informer/research-by-subject/miscellaneous/ aliencriminalwithoutconviction.pdf.

[17] *See, e.g.*, *Zalawadia v. Ashcroft*, 371 F.3d 292, 294 (5th Cir. 2004) (LPR detained and placed in removal proceedings based upon single CIMT); *In Re: Morgan*, 2005 WL 3833046, at *1 (B.I.A. Nov. 16, 2005) (same).

deportable offense, and forced to defend against his removal.[18]

B. Prior to 1997, an LPR who pled guilty to a single possession of a small amount of marijuana was not thereby rendered removable.

A retroactive repeal of *Fleuti* subjects an LPR with a single, pre-IIRIRA conviction for possession of less than thirty grams of marijuana to removal upon return from brief travel abroad. This serious new legal consequence was not foreseeable at the time of his or her plea. As remains true today, U.S. immigration law traditionally carved out an exception from the grounds of deportability for a single conviction for possession of a *de minimis* amount of marijuana.[19] Prior to IIRIRA, LPRs with such convictions faced no immigration consequences. They were not deportable because of this carve-out; and under *Fleuti*, they were not categorized as arriving aliens upon return from short trips, and therefore were never subject to the more stringent grounds of inad-

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[18] Mr. Rivera has just one conviction. In 1993, he pled guilty to a non-deportable theft offense and was sentenced to two days in jail and ordered to pay court costs. Letter from Heather Yvonne Axford, Esq., Central American Legal Assistance, to Nancy Morawetz, Supervising Attorney, Washington Square Legal Services (Nov. 10, 2011) (on file with Washington Square Legal Services). "Samuel Rivera" is a pseudonym.

[19] *See* 8 U.S.C. § 1227(a)(2)(B)(i) (exempting single conviction for possession of less than thirty grams of marijuana from deportability grounds).

missibility.[20] Again, this reflected the premise that new immigrants should face stricter standards than longtime LPRs with deep ties to the United States.

Subjecting LPRs to removal based on a single conviction for possession of a *de minimis* amount of marijuana has wide-ranging consequences. More than 800,000 people are arrested for marijuana offenses each year, the vast majority (roughly eighty-eight percent) for simple possession.[21] Moreover, "possession" is now typically a strict liability crime under state criminal law.[22] It is therefore not surprising that a substantial number of LPRs who have been living in this country for years would have isolated pre-IIRIRA convictions for possession of a small amount of marijuana.

Treating these LPRs as arriving aliens upon their return from brief travel puts them at risk of losing the lives that they have built in the United States. The case of Aubrey Clarke, currently facing removal proceedings, is illustrative.

> **Aubrey Clarke** became an LPR in 1983. He has built his life in the United States, as have

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[20] Under 8 U.S.C. § 1182(a)(2)(A)(i)(II), an alien who violates *any* controlled substance law is inadmissible.

[21] *See* FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES, 2009 tbl. 29 (2010) (showing that 758,593 people were charged with simple possession in 2009).

[22] Mere presence in a location where there are drugs is often sufficient to prove constructive possession, and there are no meaningful defenses available. *See* Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 167 (2008).

his U.S. citizen mother and sister. A resident of Chicago, Mr. Clarke has held the same job for fourteen years. He also keeps in daily contact with his mother, who is in a nursing home. In 2010, he took a brief trip to Canada to visit a relative. He had previously traveled abroad on several occasions, visiting family in his native Guyana and Canada, without incident. This trip proved to be different. Upon his return, he was treated as an arriving alien and placed in removal proceedings on the grounds that he was inadmissible by reason of an eighteen-year-old conviction for possession of less than thirty grams of marijuana.[23] When Mr. Clarke pled to this charge, it carried no immigration consequences. He now faces potential deportation.[24]

C. Prior to 1997, no criminal conviction subjected an LPR to the caprices of the no-bond detention system.

When courts apply 8 U.S.C. § 1101(a)(13)(C)(v) retroactively, the cruel irony is that, upon their return from brief travel, many LPRs who took pleas in

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[23] In 1993, Mr. Clarke was convicted of possession of marijuana of less than thirty grams. His sentence for this offense was a $100 fine, which he paid, and 125 hours of public service, which he performed. Letter from Mony Ruiz-Velasco, Esq., Director of Legal Services, National Immigrant Justice Center to Nancy Morawetz Supervising Attorney, Washington Square Legal Services (Nov. 10, 2011) (on file with Washington Square Legal Services).

[24] *Id.*

part to avoid risking prison sentences become subject to confinement without the right to seek bond. This is because arriving aliens charged as inadmissible are not provided access to a bond hearing before a neutral immigration judge.[25] Their only relief from detention is a discretionary grant of parole by a DHS officer limited to instances of "urgent humanitarian reasons" or "significant public benefit."[26]

The prospect of no-bond detention contrasts sharply with the pre-IIRIRA landscape. An LPR facing a criminal charge prior to IIRIRA was presented with a bargain: He would serve his criminal sentence—if any—and if placed in deportation proceedings would be considered for a 212(c) waiver.[27] The possibility of unreviewable, no-bond detention was conspicuously absent from this bargain—because either his plea was to a non-deportable offense[28] or he was entitled to a bond hearing if placed in deporta-

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[25] 8 C.F.R. § 1003.19(h)(2)(i)(B) (barring immigration judge jurisdiction over arriving alien detention decisions).

[26] 8 U.S.C. § 1182(d)(5)(A).

[27] In the pre-IIRIRA era, relief under § 212(c) was broadly available. *I.N.S. v. St. Cyr*, 533 U.S. 289, 289 (2001). This Court has recognized that many LPRs facing plea decisions relied on the opportunity to obtain a waiver when they took pleas. *Id.* at 325; *see also Tasios v. Reno*, 204 F.3d 544, 551-52 (4th Cir. 2000) ("[A]n alien might . . . plead guilty to a criminal charge, banking on a lighter sentence that would preserve the availability of a § 212(c) waiver. . . . [so] the legal effect of pleading guilty . . . was mitigated by the realistic possibility of obtaining a waiver.").

[28] *See, e.g.*, *Zalawadia*, 371 F.3d at 294 (LPR subjected to no-bond detention upon return from brief travel abroad).

tion proceedings.[29] Since no-bond detention did not enter the plea calculus for an LPR (as long as he did not plan to leave the United States for more than brief trips), many LPRs agreed to pleas that required little or no jail time.[30] It was not that such LPRs failed to read the fine print; there *was no* fine print. They simply did not face the risk of no-bond detention—whether criminal or civil—for their pleas.

The story of Jesus Collado demonstrates the devastating consequences of no-bond detention on longtime LPRs returning from brief travel abroad. Even those who eventually obtain relief may suffer from the attendant consequences of no-bond detention: physical and emotional hardship, loss of employment, separation from family, and the costs associated with retaining counsel.

> **Jesus Collado** came to New York in 1972 at age seventeen and soon became an LPR. In the Washington Heights neighborhood of Manhat-

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[29] *See* 8 U.S.C. § 1226(a). IIRIRA introduced mandatory, no-bond detention for certain noncitizens facing removal whose release from incarceration for their deportable offenses occurred after October 8, 1998. *See* 8 U.S.C. § 1226(c).

[30] The desire to avoid any risk of jail time often plays an overriding role in a plea decision. Although innocent, a defendant may plead guilty to avoid the threat of jail time. *See Mojica v. Reno*, 970 F. Supp. 130, 175 (E.D.N.Y. 1997), *aff'd in part, dismissed in part sub nom. Henderson v. I.N.S.*, 157 F.3d 106 (2d Cir. 1998); *North Carolina v. Alford*, 400 U.S. 25, 33 (1970) (holding that guilty plea is not inconsistent with claim of innocence because "reasons other than the fact that he is guilty may induce a defendant to so plead"). *See also infra* Part II.C (discussing plea taken by Emma Mendez de Hay); *infra* Part III.A (discussing plea taken by Jerry Arias).

> tan, he married, raised a family, and ran a successful restaurant. In 1997, Mr. Collado took a brief trip to visit his family in the Dominican Republic. Upon his return, immigration officials at J.F.K. Airport treated him as an arriving alien and charged him as inadmissible based on a twenty-four-year-old misdemeanor conviction.[31] He was immediately placed in detention, where he remained for seven months. As an arriving alien, he was not eligible for review of his confinement by an immigration judge. While in prison, Mr. Collado nearly lost his restaurant and was unable to support his family. Upon his release, he found himself in disastrous economic straits, owing thousands of dollars in late fees to vendors, back rent to his landlord, and medical bills. Even though an immigration judge eventually dismissed the case against him, the sixteen-month removal proceedings took an immense toll on Mr. Collado and his family.[32]

No-bond detention represents an extreme deprivation of liberty that was unforeseeable for LPRs faced with pre-IIRIRA plea decisions. It is common practice for federal immigration officials to transfer

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[31] *In Re: Collado-Munoz*, 21 I. & N. Dec. 1061 (B.I.A. 1998). As a teenager, Mr. Collado was involved in a consensual sexual relationship with his then girlfriend, who was four years his junior; because his girlfriend was a minor, the relationship constituted a crime. *Id.*

[32] *Id.*; *see also* Mirta Ojito, *Immigrant Fights Off His Deportation*, N.Y. TIMES, Sept. 4, 1998, at B3; Anthony Lewis, *When It Is Unjust*, N.Y. TIMES, Dec, 26, 1997, at A39.

detained immigrants to distant detention centers around the country.[33] This practice impedes detainees' access to lawyers and greatly limits their ability to defend themselves.[34]

These are not the only risks that accompany detention. Women in these facilities are often denied access to privacy from guards and adequate health resources.[35] Sexual abuse is also a serious problem. A recent report uncovered 185 official complaints of sexual abuse made against Immigration and Customs Enforcement since 2007.[36]

Even when these egregious events do not come to pass, detention separates LPRs from their family and friends for long periods. While detained, LPRs are unable to support and care for their dependents. The case of Emma Mendez de Hay demonstrates the

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[33] *See* HUMAN RIGHTS WATCH, A COSTLY MOVE (2011), *available at* http://www.hrw.org/sites/default/files/reports/us0611webwcover.pdf.

[34] *See* NAT'L IMMIGRANT JUSTICE CTR., ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT (2010), *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf.

[35] *See* HUMAN RIGHTS WATCH, DETAINED AND DISMISSED: WOMEN'S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION (2009), *available at* www.hrw.org/sites/default/files/reports/wrd0309web_1.pdf.

[36] *See* SEXUAL ABUSE IN IMMIGRATION DETENTION, http://www.aclu.org/sexual-abuse-immigration-detention (last visited Nov. 21, 2011).

array of consequences that immigration detention can have on longtime LPRs.

> **Emma Mendez de Hay** came to the United States from Mexico more than thirty years ago and quickly became an LPR. Her mother and all but one of her siblings are U.S. citizens or lawful permanent residents. As a single mother she raised four U.S. citizen children. She also grew a successful restaurant business, paid taxes, and volunteered as an interpreter for a local hospital. In 1999, she took a brief trip to Italy to meet her fiancé's family. Upon return from this trip, she was treated as an arriving alien and charged as inadmissible based upon a decades-old conviction.[37] She was detained and transferred to a detention facility in Louisiana. As an arriving alien, she was denied an opportunity for a bond hearing and forced to face removal proceedings hundreds of miles from her family in Washington State. While she was in detention, her eleven-year-old son, a child with special needs, became suicidal; her twenty-year-old daughter was forced to drop out of college and work two jobs to support the family. Ms. Mendez de Hay eventually obtained a 212(c) waiver, but only after

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[37] In 1992, Ms. Mendez de Hay translated an ambiguous conversation between her cousin and an undercover police officer. She was charged with using a telephone to facilitate the distribution of cocaine and pled guilty to avoid jail time. She went on to help prosecutors convict several drug traffickers, including her own cousin. Susan Gilmore, *Mother Won't Be Deported After All*, SEATTLE TIMES, Aug. 7, 2002.

she and her family had endured the hardships of detention—the very consequence that she sought to avoid with her plea.[38]

III. RETROACTIVE APPLICATION OF ANY REPEAL OF *FLEUTI* BURDENS THE RIGHT TO TRAVEL ABROAD, A RIGHT OF FUNDAMENTAL IMPORTANCE TO LPRS.

The government contends that LPRs can simply avoid the retroactive effects discussed in the preceding sections by "refrain[ing] from depart[ing] . . . the United States (or from returning to the United States)."[39] This suggestion is beyond cavalier. Refraining from international travel restricts the ability of LPRs to comply with universally recognized faith-based obligations, such as caring for ill relatives and attending funeral services abroad. Foregoing travel abroad also means that many LPRs will become permanently separated from their families. This is because current immigration law makes it exceedingly difficult to bring over close relatives on a temporary or permanent basis. And, as is self-evident,

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[38] *See id.*; Peggy Anderson, *Immigrant Faces Deportation Under Tough INS Laws*, OREGONIAN, Feb. 14, 2000, at E7; Susan Gilmore, *Tough INS Law Leaves Family in Turmoil as Trip to Italy Ends in Jail*, SEATTLE TIMES, Feb. 7, 2000; Tamyra Howser, *Woman Awaits Deportation Appeal With Fear, Hope: CATCH-22: Reunited With Her Kids, but in Limbo After Tripped Up by Immigration Law*, NEWS TRIBUNE, Jan. 1, 2001; Nicole Brodeur, *Caught in the Wheels of Justice*, SEATTLE TIMES, Mar. 14, 2000.

[39] Brief for Respondent in Opposition, Vartelas v. Holder (No. 10-1211), 2011 WL 3467249, at *17.

parents of minor children in the United States can hardly "refrain" from returning to them. In sum, a retroactive application of any repeal of *Fleuti* severely burdens LPRs' right to international travel.[40]

A. Without international travel, LPRs cannot fulfill faith-based obligations abroad, such as attending funerals.

For many immigrants of faith, the ability to comply with fundamental religious obligations hinges on the right to travel. The ability to carry out these obligations abroad has traditionally been a right afforded green card holders. A retroactive repeal of the *Fleuti* doctrine strips them of this vaunted, relied-upon right. Indeed, where courts have retroactively applied a repeal of *Fleuti*, the results have been nothing short of cruel. LPRs returning from funerals and other sacred family gatherings have been barred from returning to their homes, detained, and placed in removal proceedings.

The importance of religion in the lives of U.S. based immigrants is a well-documented phenomenon.[41] According to many studies, religion occupies a more central role in the lives of immigrants than na-

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[40] While all persons living in the United States have a constitutionally protected interest in international travel, *see Kent v. Dulles*, 357 U.S. 116, 125 (1958) (affirming international travel as fundamental "liberty" protected by Fifth Amendment), that interest is especially salient for LPRs, who typically have close relatives that live abroad.

[41] *See, e.g.*, R. Stephen Warner, *Religion and New (Post-1965) Immigrants: Some Principles Drawn from Field Research*, AM. STUD. 271 (2000) (describing why religion typically plays a "salient" role in the lives of immigrants).

tive-born Americans: Extraordinarily high church attendance rates have been recorded among Haitian, Vietnamese, and Korean immigrants.[42] Latino immigrants are also overwhelmingly religious: Seventy percent of Latinos identify as Catholics, while immigrants from Latin American countries account for nearly forty percent of U.S.-based Roman Catholics.[43]

Across religions and cultures, family attendance at religious rites upon the passing of a loved one is an imperative of faith.[44] Familiar examples in the Christian tradition include the funeral mass and wake. In the Jewish tradition, burial of the deceased must occur within twenty-four hours. Relatives are customarily present to place handfuls of earth on top of the casket and then to engage in a week-long process of grief and mourning, known as sitting *shiva*.[45] According to Islamic tradition, burial is to be carried out as soon as possible. Prior to the burial, the immediate family of the deceased is responsible for bathing and shrouding the body.[46] Myriad folk religious practices also impose obligations on family

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[42] *See* Alex Stepick, *God Is Apparently Not Dead*, *in* IMMIGRANT FAITHS: TRANSFORMING RELIGIOUS LIFE IN AMERICA 13 (Karen I. Leonard, Alex Stepick, Manual A. Vasquez & Jennifer Holdaway eds., 2005).

[43] *See* Peggy Levitt, GOD NEEDS NO PASSPORT 14, 205 (2007).

[44] Religious obligations are also at stake in the case of weddings, births, baptisms, pilgrimages and other sacred events that invariably occur abroad.

[45] *See* Simcha Fishbane, *Jewish Mourning Rites—A Process of Resocialization*, ANTHROPOLOGICA 69 (1998).

[46] *See* Solomon Alexander Nigosian, ISLAM: ITS HISTORY, TEACHING, AND PRACTICES 17 (2004).

members of the deceased. In Miraflores, a village in the Dominican Republic, relatives of the deceased sit guarding the area where the body lies for nine days. They believe this enables the deceased to remain present in a different form after death, and to be visited, consulted, or petitioned.[47]

LPRs who sustained pre-IIRIRA convictions could not have expected that their right to carry out these sacred obligations would one day be denied. Where *Fleuti*'s repeal has been retroactively applied, LPRs who traveled in reliance on this historic right have been exposed to dramatic, unanticipated legal consequences. The story of Jerry Arias is illustrative.

> **Jerry Arias** immigrated to the United States from the Dominican Republic as a teenager in 1967. He soon developed deep ties to New York City, where he raised six U.S. citizen children. In December 1998, Mr. Arias' father, a U.S. citizen, passed away. According to his wishes, his family sent the body back to the Dominican Republic to be buried. Mr. Arias traveled there for the funeral. When he returned to the United States, he was detained at J.F.K Airport and charged as inadmissible based on a single, two-decades-old conviction for which he served no jail time.[48] Although a resident of the

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[47] *See* Peggy Levitt, *Local-Level Global Religion: The Case of U.S.-Dominican Migration*, J. FOR THE SCI. STUDY OF RELIGION 74 (Mar. 1998).

[48] Mr. Arias pled guilty in 1977 to criminal sale of a controlled substance in the fifth degree and was sentenced to two years of probation. *See Arias-Agramonte v. Comm'r of I.N.S.*, 2000 WL 1059678 at *1-2 (S.D.N.Y. Aug. 1, 2000). His case il-

Bronx, he was transferred to a facility in York, Pennsylvania, far from his family, where he sat in detention for twenty months. As an arriving alien, he was not eligible for review of his detention by an immigration judge. The prolonged detention exacted extreme hardships on both Mr. Arias, who was nearly sixty years old, and his family.[49]

B. Without the ability to take short trips abroad, LPRs cannot maintain essential family ties or respond to family emergencies.

For many LPRs with pre-1997 convictions, a retroactive repeal of *Fleuti* threatens them with permanent separation from family abroad. This is due, in part, to the difficulty that today's LPRs have in bringing even close relatives to the United States on either a temporary or permanent basis. For some categories of relatives, such as parents, there is no direct route to apply for admission based upon a family relationship.[50] Petitions for parents can only be

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lustrates how factual innocence and a guilty plea are not mutually exclusive. In fact, the immigration judge found evidence of innocence despite the conviction: "[Mr. Arias] was in a restaurant. Somebody asked to change a $50 bill. He changed the bill for something smaller for somebody. And it turns out that the $50 bill was a marked bill that had been part of a drug transaction." *Id.* (quoting decision of immigration judge granting 212(c) relief).

[49] *Id.*

[50] *See* 8 U.S.C. § 1151(c).

made by U.S. citizens, meaning LPRs must first wait for their petitions for citizenship to be processed.[51]

Even when family-based visas are available, delays can be enormous. According to the State Department, there were 4,552,774 people waiting in the family immigration backlog as of November 2010.[52] As of November 2011, the wait time for spouses and minor children of LPRs was three years for Mexican applicants and two years for applicants from all other countries.[53] And each year, the wait grows.[54] Compounding these difficulties is the reality that relatives with pending family-based petitions often have difficulty obtaining visitors' visas.[55] Under the-

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[51] *See* 8 U.S.C. § 1151(b)(2)(A)(i).

[52] U.S. DEP'T OF STATE, ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS IN THE FAMILY-SPONSORED AND EMPLOYMENT-BASED PREFERENCES REGISTERED AT THE NATIONAL VISA CENTER AS OF NOVEMBER 1, 2010 (2011), *available at* http://travel.state.gov/pdf/WaitingListItem.pdf.

[53] *See* U.S. DEP'T OF STATE, VISA BULLETIN FOR NOVEMBER (2011). The wait time for unmarried children of U.S. citizens aged twenty-one or older was even longer: eighteen years for relatives in Mexico, fourteen years for those in the Philippines, and seven years for those in all other countries. *Id.*

[54] *See generally*, DANIEL HUANG, ASIAN PAC. AM. LEGAL CTR. OF S. CALIFORNIA, A DEVASTATING WAIT: FAMILY UNITY AND THE IMMIGRATION BACKLOGS 3 (2008), *available at* http://www.advancingequality.org/attachments/files/117/APALC_family_report.pdf.

[55] An important factor used to determine entitlement to a temporary visa is intent "to enter the United States for a period of specifically limited duration." An immigrant who desires a family visa, but in the interim seeks a temporary visitation, must be classified according to his or her "principal" purpose. U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL ("FAM") § 41.31, N1, 6.1 (Notes) (Oct. 10, 2011).

se conditions, LPRs must make trips abroad to maintain even basic family ties. As a result, periodic travel to their countries of origin is the norm for many groups of LPRs.[56]

Even LPRs who do not travel regularly are eventually forced to make trips abroad for family emergencies. When a repeal of *Fleuti* is retroactively applied, LPRs who travel to attend to these emergencies risk the security of their green cards and their lives in the United States.

> **Jose Velasquez**, a native of Panama, was admitted to the United States as an LPR in 1960. Along with his U.S. citizen wife, he raised three children, all of whom are U.S. citizens. His mother, older brother and sister are also citizens. For years, he operated the Velasquez Deli in Philadelphia and owned a home in the suburbs. In 1998, Mr. Velasquez traveled to Panama to visit his mother, who was scheduled to have hip-replacement surgery. Upon his return, he was treated as an arriving alien at Newark Airport and charged as inadmissible based upon a conviction from nineteen years prior, for which he served no jail time.[57] He was placed in detention, and be-

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[56] *See, e.g.*, Manuel Orozco, *Transnationalism and Development: Trends and Opportunities in Latin America*, *in* REMITTANCES: DEVELOPMENT IMPACT AND FUTURE PROSPECTS 307, 313 (Samuel Munzele Maimbo & Dilip Ratha eds., 2005) (finding that over one-third of all immigrants travel to their home countries at least once per year).

[57] *See Velasquez v. Reno*, 37 F. Supp. 2d 663, 665 (D.N.J. 1999). In 1980, Mr. Velasquez was at a party where "he was approached by a friend and asked if he could sell cocaine; [and]

cause he was labeled as an arriving alien, was without access to a bond hearing.[58]

IV. PRINCIPLES OF LENITY REQUIRE RESOLVING ANY AMBIGUITY IN FAVOR OF LONGTIME LPRS.

If this Court finds that ambiguity exists as to whether 8 U.S.C. § 1101(a)(13)(C)(v) applies retroactively, the immigration rule of lenity requires that such ambiguity be resolved in favor of Petitioner.[59] As this Court has held, "since the stakes are considerable for the individual [alien], we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."[60] While

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replied that he did not sell cocaine, but that another man at the party might do so." *Id.* He never anticipated receiving nor received any compensation for any transaction that might thereafter have taken place. *Id.* Velasquez pled guilty to conspiracy to sell and the sale or delivery of a controlled substance and was sentenced to five years' probation and a $5,000 fine. *Id.*

[58] *Id.*

[59] *See Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (construing statutory ambiguity in favor of noncitizen); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (same). This Court has specifically identified the rule of lenity as a traditional tool of statutory construction that renders a statute unambiguous and forecloses deference to any contrary agency interpretation. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984-85 (2005) (lower court erred in not deferring to agency interpretation because "the court invoked no other rule of construction (such as the rule of lenity) requiring it to conclude that the statute was unambiguous to reach its judgment").

[60] *Fong Haw Tan*, 333 U.S. at 10.

deportation is always a harsh measure, the "stakes" are particularly high for LPRs who have spent decades building their lives in the United States.

CONCLUSION

Amici are firsthand witnesses to the injustice of reclassifying longtime LPRs as arriving aliens. Retroactive repeal of *Fleuti* will subject LPRs with pre-IIRIRA pleas to harsh new legal consequences upon their return from brief travel abroad, including no-bond detention and potential removal. *Amici* seek a ruling that would ensure that these valued members of our communities remain secure in their status as LPRs, and in their right to take brief trips abroad.

For these reasons, the decision of the Court of Appeals should be reversed.

November 22, 2011

Respectfully submitted,

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APPENDIX

DESCRIPTIONS OF *AMICI CURIAE*

The **Asian American Justice Center ("AAJC")**, a member of the Asian American Center for Advancing Justice, is a national non-profit, non-partisan organization working to advance the human and civil rights of Asian Americans and build and promote a fair and equitable society for all. Founded in 1991 and based in Washington, D.C., AAJC engages in litigation, public policy, advocacy, and community education and outreach on a range of issues, including immigration and immigrants' rights. AAJC joins this brief because a retroactive re-categorization of longtime LPRs as "arriving aliens" upon their return from short trips abroad has devastating impacts on Asian American immigrants, often longtime lawful permanent residents, who face the real-world consequences of being permanently separated from their families.

The **National Council of La Raza ("NCLR")**, the largest national Hispanic civil rights and advocacy organization in the United States, works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations ("CBOs"), NCLR reaches millions of Hispanics each year in forty-one states, Puerto Rico, and the District of Columbia. NCLR works through two primary, complementary approaches: (1) capacity-building assistance to support and strengthen Hispanic CBOs, especially those that serve low-income and disadvantaged Latinos; and (2) applied research, policy analysis, and advocacy to encourage adoption of programs and policies that equitably

serve Hispanics. NCLR believes that LPRs returning from short trips abroad that are not "meaningfully disruptive" of their LPR status should not be retroactively reclassified as arriving aliens because of the devastating consequences they and their families could face.

LatinoJustice PRLDEF, which was founded in New York City in 1972, has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law. Our continuing mission is to protect the civil rights of all Latinos and to promote justice for the pan-Latino community especially across the Eastern United States. During its thirty-nine-year history, LatinoJustice has litigated numerous cases on behalf of the Latino community against multiple forms of discrimination. LatinoJustice PRLDEF joins this brief because retroactively classifying longtime LPRs as "arriving aliens" upon their return to the United States from brief travel abroad results in unforeseen legal consequences with devastating impacts upon longtime Latino LPRs and their families.

The **Drug Policy Alliance ("DPA")** is a national nonprofit organization that promotes policy alternatives to the drug war that are grounded in science, compassion, health, and human rights. DPA works to end drug policies predicated on arresting, convicting, incarcerating, disenfranchising and otherwise harming millions of non-violent people. DPA has an interest in this case because it advocates for policies aimed at eliminating or reducing the lifetime consequences, including immigration penalties, which result from minor drug law violations.

United Sikhs is a UN-affiliated nongovernmental organization whose mission is to protect disadvantaged communities through international civil and human rights advocacy, humanitarian aid, and health and education initiatives. We are deeply concerned by the impact of retroactively re-categorizing LPRs as arriving aliens, specifically in the context of how it would impact their religious freedoms. For many immigrant faith communities, the restrictions on their freedom of movement to travel outside the United States to attend funerals, weddings, births, baptisms, and pilgrimages would be severely impinged and would effectively cut them off from their religious duty and obligations.

South Asian Americans Leading Together ("SAALT") is a national non-profit organization whose mission is to elevate the voices and perspectives of South Asian individuals and organizations to build a more just and inclusive society in the United States. As an organization that advocates on behalf of a community that is predominantly foreign-born with a significant number of lawful permanent residents, SAALT joins this brief to ensure that any *Fleuti* repeal not be retroactively applied. Such an interpretation would disrupt the lives of individuals who have long established their lives here, and is counter to basic notions of fairness.

Founded in 1977, **Asian Law Alliance ("ALA")** is the only legal services organization providing legal services to the Asian and Pacific Islander residents of Santa Clara County, California. ALA is dedicated to providing multilingual legal assistance to immigrants and refugees to promote dignity and self-

reliance. In the last thirty-four years, ALA has provided a wide range of immigration legal services to the community.

The **Sikh American Legal Defense and Education Fund ("SALDEF")** is a national civil rights and educational organization. Its mission is to protect the civil rights of Sikh Americans and foster a safe environment in the United States for future generations of Sikh Americans. SALDEF seeks to empower Sikh Americans through legal assistance, educational outreach, legislative advocacy, and media relations. SALDEF is participating in this amicus brief as there are many immigrants in the Sikh American community and the outcome of this case has the potential to directly affect their lives.

The mission of the **Asian Law Caucus** is to promote, advance, and represent the legal and civil rights of Asian and Pacific Islander communities. Recognizing that social, economic, political and racial inequalities continue to exist in the United States, the Asian Law Caucus is committed to the pursuit of equality and justice for all sectors of our society, with a specific focus directed toward addressing the needs of low-income, immigrant and underserved Asian Pacific Islanders. As the oldest Asian American legal rights organization devoted to protecting the civil rights of all racial and ethnic minorities, we have a strong interest in protecting the integrity of the core constitutional principle of equal protection of the law for all communities of color. We provide direct representation to immigrants facing detention and deportation in the Bay Area.

The **Asian Pacific American Legal Center ("APALC") of Southern California**, a member of the Asian American Center for Advancing Justice, was founded in 1983 and is the nation's largest non-profit public interest law firm devoted to the Asian American and Pacific Islander community. APALC provides direct legal services and uses impact litigation, public advocacy, and community education to obtain, safeguard, and improve the civil rights of this community. APALC serves 15,000 individuals and organizations each year through direct services, outreach, training, and technical assistance. APALC advocates for the full and equal integration of immigrant communities in a variety of contexts and focuses particularly on the needs of Asian American and Pacific Islander immigrants.

The **Northern Manhattan Coalition for Immigrant Rights ("NMCIR")** was founded in 1982 as a community response to the influx of immigrants settling in Northern Manhattan and the Bronx. Every year, NMCIR helps thousands of immigrant families stay together by providing free and affordable personalized support around a vast array of family-based immigration petitions. NMCIR also helps the immigrant community build visibility and political power via voter registration, civic education, and supporting its member-driven advocacy campaigns around deportation issues. NMCIR joins this brief because reclassifying longtime LPRs as arriving aliens upon return from brief travel abroad will have a devastating effect on our constituents, many of whom require travel to maintain essential family ties.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1211

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IN THE SUPREME COURT OF THE UNITED STATES

PANAGIS VARTELAS, PETITIONER,
v.
ERIC HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, RESPONDENT.

On Writ Of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR ASIAN AMERICAN JUSTICE CENTER, NATIONAL COUNCIL OF LA RAZA, LATINOJUSTICE PRLDEF, DRUG POLICY ALLIANCE, UNITED SIKHS, SOUTH ASIAN AMERICANS LEADING TOGETHER, ASIAN LAW ALLIANCE, SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, NORTHERN MANHATTAN COALITION FOR IMMIGRANT RIGHTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is 8 U.S.C. § 1101(a)(13)(C)(v), which has been interpreted as depriving certain lawful permanent residents of their right to take brief trips abroad without being denied reentry, impermissibly retroactive as applied to lawful permanent residents who pleaded guilty before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)?

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INTEREST OF THE *AMICUS CURIAE*

The National Immigrant Justice Center (NIJC) is a non-profit organization accredited by the Board of Immigration Appeals since 1980 to provide immigration assistance. NIJC provides legal education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence, victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In 2009, NIJC provided such legal services to more than 10,000 non-citizens.

NIJC also promotes respect for human rights and access to justice for immigrants, refugees, and asylum seekers through policy advocacy, impact litigation, and public education. In light of the foregoing mission, NIJC has a deep interest in ensuring that the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") is not applied retroactively in a manner that is inconsistent with Congressional intent and fundamental principles of fairness.

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this briefs preparation or submission. Counsel of record for both petitioner and respondents received timely notice of amicus's intent to file the brief, and consented to it.

INTRODUCTION AND SUMMARY OF ARGUMENT

Prior to 1997, the Immigration and Nationality Act ("INA") set out different standards governing "exclusion" and "deportation." An alien seeking "entry" into the United States could be "excluded" based on a broad set of grounds and with relatively minimal procedures. But an alien who had already "entered" the country could be "deported" only on narrower grounds and with greater procedural protections. *See, e.g.*, 8 U.S.C. §§ 1182(a), 1251(a) (1994); *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212-15 (1953).

In *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963), this Court held that a lawful permanent resident's "innocent, casual, and brief" trip outside the country was not sufficiently "disruptive of his resident alien status" that a return from such a trip could be considered an "entry" under the INA. *Id.* As a result, a lawful permanent resident ("LPR") who was not deportable while in the United States, but would have been excludable if seeking "entry" into the country, had the right to take "innocent, casual, and brief" trips abroad without triggering exclusion proceedings upon return.

Petitioner was such an alien. That is, he was an LPR with a minor conviction for conspiracy to make or possess a counterfeit security. Pet. App. 2-3. This single conviction did not render Petitioner deportable, 8 U.S.C. § 1251(a) (1994), but this conviction was for an excludable offense; *i.e.*, it would have made Petitioner excludable if he were seeking entry, as it was for a "crime involving moral

turpitude," 8 U.S.C. § 1182(a) (1994). Thus, prior to 1997, Petitioner's conviction did not prevent him from taking brief trips outside the United States.

With the passage of IIRIRA in 1997, Congress replaced the term "entry" with the term "admission" as the key to determining many aliens' legal status. Interpreting this new term, defined in INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v), the BIA concluded that "admission" was required for *any* physical entry into the country by an alien convicted of an excludable offense triggering inadmissibility under 8 U.S.C. § 1182(a)(2), even if the alien's trip abroad had been "innocent, casual, and brief." *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1065-66 (BIA 1998) (en banc). Under the BIA's interpretation, IIRIRA thus abrogated the *Fleuti* doctrine for all aliens convicted of an excludable offense.[2]

As a result, now if such aliens take an "innocent, casual, and brief" trip overseas, they must seek admission upon return. That not only places their legal resident status at risk, but also could result in their detention for a period of months, or even years. *See* 8 C.F.R. § 1003.19(h)(2)(i). And this is so for all aliens, regardless of whether they were convicted of excludable offenses before or after IIRIRA's effective date.

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[2] *Amicus curiae* believes there are strong arguments that *Collado-Munoz* was wrongly decided. *See, e.g., Collado-Munoz*, 21 I. & N. Dec. at 1075 (Rosenberg, Bd. Mem., dissenting) ("[T]he statute is utterly silent as to the continued vitality of the *Fleuti* doctrine."). Given the formulation of the Question Presented, however, *amicus curiae* will assume *arguendo* that IIRIRA abrogated the *Fleuti* doctrine.

This Court has long recognized that federal statutes will not be read to apply retroactively absent a clear expression of congressional intent to the contrary. This presumption is grounded in "[e]lementary considerations of fairness," which dictate that "'the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). In assessing whether a statute operates retroactively, the Court has generally asked "whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 270. Several members of the Court have suggested that an alternative formulation better explains the Court's precedents. Under that approach, a court should determine "the relevant activity that the [new] rule regulates"; "only such relevant activity which occurs *after* the effective date of the statute is covered." *Id.* at 291 (Scalia J., concurring).

IIRIRA's abrogation of the *Fleuti* doctrine would be impermissibly retroactive under either of the foregoing standards if applied to LPRs who, like petitioner, were convicted of an excludable offense before the enactment of IIRIRA. Limiting the ability of such LPRs to travel overseas would attach major "new legal consequences to events completed before [IIRIRA's] enactment." *Id.* at 270 (majority opinion). Moreover, because subsection 101(a)(13)(C)(v) constitutes an added penalty for certain crimes, "the relevant activity that the [new] rule regulates" is petitioner's conviction for an excludable offense, an "activity which occurs [before] the effective date of

the statute." *Id.* at 291 (Scalia J., concurring). Because it is undisputed that subsection 101(a)(13)(C)(v) does not expressly define its own temporal reach, the presumption against retroactivity dictates that subsection 101(a)(13)(C)(v) not be applied in this retroactive manner.

The Second Circuit reached a contrary conclusion by erroneously requiring a showing of specific, individualized reliance before finding a statute to have retroactive effect. This approach cannot be reconciled with the decisions of this Court, fundamentally misunderstands the role of reliance interests in applying the presumption against retroactivity, and would produce the untenable result of a single statute meaning as many things as there are people to whom it applies.

This Court should accordingly reject the Second Circuit's approach and instead hold that subsection 101(a)(13)(C)(v) does not apply to LPRs who, like Petitioner, were convicted of an excludable offense prior to the Act.

ARGUMENT

As this Court explained in *Landgraf*, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." 511 U.S. at 265. The presumption stems from a principle with "timeless and universal appeal": "'the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.'" *Id.* (quoting *Kaiser*, 494 U.S. at 855 (Scalia, J., concurring)). Indeed, this "antiretroactivity principle" is reflected in several provisions of the

Constitution, including the Ex Post Facto Clause, the Contracts Clause, and the Fifth Amendment's Due Process Clause. *Id.* at 266.

It is undisputed that IIRIRA's abrogation of the *Fleuti* doctrine is not explicitly retroactive. *See* Pet. App. 20-21 ("[H]ere, we note—and the government concedes—that Congress has not expressly prescribed the temporal reach of § 101(a)(13)."). Accordingly, the question in this case is simply whether abrogating the *Fleuti* doctrine for LPRs already convicted of an excludable offense before IIRIRA's effective date would constitute a retroactive change to their legal rights. *See Landgraf*, 511 U.S. at 280. Such a change would be impermissibly retroactive. The Second Circuit's contrary holding cannot be reconciled with either of the approaches suggested by this Court's case law or basic principles of statutory interpretation.

I. ABROGATION OF THE *FLEUTI* DOCTRINE WOULD BE IMPERMISSIBLY RETROACTIVE IF APPLIED TO LPRS CONVICTED OF AN EXCLUDABLE OFFENSE BEFORE IIRIRA'S EFFECTIVE DATE.

A. A Statute Applies Retroactively if it Attaches New Legal Consequences to Past Conduct or Regulates Past Activity.

Despite the well-established pedigree of the presumption against retroactivity, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. But the majority opinion in *Landgraf*, as well as a concurring opinion by Justice Scalia, offered several guideposts that

courts should consider in assessing the retroactive nature of a legal change.

1. The *Landgraf* majority.

When applying the presumption against retroactivity, the overarching inquiry is "whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 270. The *Landgraf* majority drew this principle from Justice Story's classic formulation:

> "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . ."

Id. at 269 (quoting *Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (No. 13,156) (CC NH 1814)).

Moreover, the Court added, "[t]he presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Id.* at 270. In applying the presumption, "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.*

Finally, the Court explained, new rules "conferring or ousting jurisdiction" over suits arising from prior conduct are often not considered retroactive because "[a]pplication of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case." *Id.* at 274 (internal quotation marks

omitted). By the same token, "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." *Id.* at 275. Although such rules may sometimes be considered retroactive, they generally do not pose the same retroactivity concerns because they "regulate secondary rather than primary conduct." *Id.*

Turning to the statute before it, the *Landgraf* majority easily concluded that the punitive damages remedy added to Title VII by the 1991 Civil Rights Act could not apply to pre-enactment conduct absent a clear statement of congressional intent. *Id.* at 281. That result was clear, the Court reasoned, because punitive damages "share key characteristics of criminal sanctions." *Id.*

The Court reached the same conclusion regarding the retroactivity of the new *compensatory* damages provision added to Title VII. *Id.* at 282. Because this new compensatory damages remedy "only reache[d] discriminatory conduct already prohibited by Title VII," the Court acknowledged, it "d[id] not make unlawful conduct that was lawful when it occurred." *Id.* at 281-82. "Nor could anyone seriously contend that the compensatory damages provisions smack of a 'retributive'" purpose. *Id.* at 282. Nonetheless, the Court concluded that the new compensatory remedy could not be applied to pre-enactment conduct absent a clear statement, for several reasons.

First, compensatory damages are "quintessentially backward looking."

Second, "[t]he introduction of a right to compensatory damages is also the type of legal

change that would have an impact on private parties' planning." *Id.* To be sure, the Court conceded, "concerns of unfair surprise and upsetting expectations [would be] attenuated in [many] case[s] of intentional employment discrimination, which has been unlawful for more than a generation." *Id.* at 282 n.35. But, the Court reasoned, "a degree of unfairness is inherent *whenever* the law imposes additional burdens based on conduct that occurred in the past." *Id.* (emphasis added).

Finally, even though the compensatory damages remedy could be seen as simply "increasing the amount of damages available under a preestablished cause of action," such a change would still raise retroactivity concerns because "[t]he *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." *Id.* at 283-84.

2. The *Landgraf* concurrence.

Justice Scalia agreed with the majority's conclusion regarding the retroactivity of the 1991 Civil Rights Act, but took a different path to rationalize that result and the Court's retroactivity precedents. He opined that, whether a statute "upset[] vested substantive rights" did not "ha[ve] anything to do with . . . the presumed temporal application of a statute." *Id.* at 291 (Scalia J., concurring) (internal quotation marks omitted). "The critical issue," Justice Scalia explained:

> is not whether the rule affects "vested rights," or governs substance or procedure, but rather what is the relevant activity that the rule regulates. Absent a clear statement otherwise,

> only such relevant activity which occurs *after* the effective date of the statute is covered.

Id. On this analysis, both the punitive and compensatory damages provisions were easily classified as retroactive because they were "directed at the regulation of primary conduct, and the occurrence of the primary conduct is the relevant event." *Id.* at 294.

As explained below, in this case, these guideposts all point to the same conclusion: IIRIRA's abrogation of the *Fleuti* doctrine for LPRs convicted of an excludable crime prior to IIRIRA is impermissibly retroactive.

B. If Applied to LPRs Already Convicted of an Excludable Offense, Abrogation of the *Fleuti* Doctrine Would Attach New Legal Consequences to Past Conduct.

Under the *Landgraf* majority's approach, the new burden imposed by subsection 101(a)(13)(C)(v) would plainly be retroactive if applied to LPRs such as Petitioner.

Prior to 1997, LPRs who had convictions making them excludable but not deportable had a legal right to take "innocent, casual, and brief" trips abroad without facing exclusion proceedings on their return. *Fleuti*, 374 U.S. at 462. If applied to such LPRs, IIRIRA's abrogation of the *Fleuti* doctrine would eliminate that right. Put another way, subsection 101(a)(13)(C)(v) would impose an additional restriction—the inability to travel abroad without risking one's lawful status—on such LPRs as a result of their criminal convictions. This clearly "would impair rights a party possessed when he acted" and

"attach[] new legal consequences" to past acts. *Id.* at 270, 280 (majority opinion). And, far from merely ousting jurisdiction or altering procedural rules, such a change destroys a deeply significant *substantive* right. *See id.* at 274-75.

Moreover, like the Title VII remedies analyzed in *Landgraf*, the denial of the right to travel overseas is certainly "the type of legal change that would have an impact on private parties' planning." *Id.* at 282. And while, "concerns of unfair surprise and upsetting expectations are attenuated" by the fact that the conduct triggering the new burden (commission of an excludable offense) was already unlawful, as the Court explained in *Landgraf*, new burdens attached to already-unlawful conduct still implicate retroactivity concerns since "a degree of unfairness is inherent *whenever* the law imposes additional burdens based on conduct that occurred in the past." *Id.* at 282 n.35 (emphasis added).

Indeed, concerns of fair notice and reliance are far stronger in this case than in *Landgraf*. Here, in practice, the burden at issue applies *only* to those LPRs who have already been convicted of an excludable offense. As Petitioner has explained, although subsection 101(a)(13)(C)(v) by its terms punishes the *commission* of an excludable offense, it applies in practice only to LPRs with *convictions* for such offenses. Pet. Br. 47. If "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is" at the time of potentially illegal conduct, *Landgraf*, 511 U.S. at 265, such principles are even more strongly implicated during a criminal prosecution, when alien defendants "are acutely aware of the

immigration consequences of their convictions." *INS v. St. Cyr*, 533 U.S. 289, 322 (2001). Indeed, the argument for applying subsection 101(a)(13)(C)(v) in this case is akin to arguing in *Landgraf* that companies who had *already paid* judgments or settlements for Title VII violations before the 1991 amendments could be subjected to *additional* compensatory damages after them. Such an imposition is plainly retroactive.

Finally, although deportation or exclusion "is not, in a strict sense, a criminal sanction," the Court has "long recognized that deportation is a particularly severe 'penalty,'" and is "intimately related to the criminal process." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)). Thus, like the punitive damages remedy in *Landgraf*—which this Court considered to be *clearly* retroactive—the new burden imposed on Petitioner by IIRIRA "share[s] key characteristics of criminal sanctions." *Landgraf*, 511 U.S. at 281.

Because IIRIRA's abrogation of the *Fleuti* doctrine would impose a major new burden on Petitioner based on his prior conviction, would do so in a manner that generally causes unfair surprise, and would "share[e] key characteristics of criminal sanctions," such a change must be considered retroactive.

C. The Relevant Activity Regulated by IIRIRA's Abrogation of the *Fleuti* Doctrine is an LPR's Conviction for an Excludable Offense.

Application of the standard set forth in Justice Scalia's concurrence only drives home the foregoing

conclusion. Subsection 101(a)(13)(C)(v) is triggered by an alien's conviction for an excludable offense. Accordingly, such an offense is the most obvious conduct regulated by the statute. That is, by revoking the right to travel abroad without risking lawful status, IIRIRA imposes an additional penalty for the commission of excludable offenses by LPRs.

No alternative activity or event is plausibly targeted by subsection 101(a)(13)(C)(v). An LPR's brief travel abroad could hardly be the target of the provision; it is simply implausible to suggest that Congress abrogated *Fleuti* to keep LPRs with excludable offenses *in* the United States. To whatever degree the law may regard LPRs with excludable offenses as undesirable, that undesirability stems from their underlying criminal convictions, *not* from the fact that they have taken an "innocent, casual, and brief" trip outside the country. *Fleuti*, 374 U.S. at 462.

Nor can it reasonably be thought that subsection 101(a)(13)(C)(v) regulates solely the *return* of an LPR after a brief trip abroad. If an LPR's return were the only relevant event, subsection 101(a)(13)(C)(v) would apply even to LPRs who left for a brief trip *before* IIRIRA and attempted to return *after*. But that would be impossible to reconcile with *Chew Heong v. United States*, 112 U.S. 536 (1884). There, the Court refused to apply the "Chinese Restriction Act," which barred Chinese laborers from reentering the United States without a certificate issued on their departure, to aliens who had left the country before the Act's passage and tried to return without a certificate after. *Id.* at 538-39. The Court reasoned that, at the time such aliens left the country, they

had a legal right to return without such a certificate. *Id.* at 559. To apply the new requirement to them would cause "rights previously vested [to be] injuriously affected," a result the Court would not reach "unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature." *Id.*

Read through the lens of Justice Scalia's *Landgraf* concurrence, *Chew Heong* reflects a recognition that Congress was, in fact, regulating more than Chinese laborers' initial entry. It was in fact placing a new restriction on aliens already in the country: a requirement that they obtain a certificate in order to leave and return. Here too, 101(a)(13)(C)(v) plainly does not restrict LPRs entry *qua* entry. Rather, on its face, the provision regulates only those LPRs who have committed an excludable offense. Indeed, even the Second Circuit conceded that "in framing § 101(a)(13)(C)(v) . . . Congress intended the focus to be on the alien's commission of the crime." Pet. App. 25.

Other portions of IIRIRA provide telling contrast: Under 8 U.S.C. § 1101(a)(13)(C)(iii) and (vi), for example, LPRs returning from brief trips abroad are treated as applicants for admission if they engaged in illegal activity during their trip or attempt to reenter illegally. Such provisions plainly target conduct related to the LPR's travel. Here, on the other hand, there is no plausible reason why Congress would have been concerned with brief trips overseas by LPRs such as Petitioner.

Chew Heong likewise exposes the flaw in the Government's argument that Petitioner's post-IIRIRA travel is the "determinative event for retroactivity analysis" and that Petitioner "could

have avoided the application of the statute. . . . [by] refrain[ing] from departing from the United States (or from returning to the United States)." BIO 12-13. The statute at issue in *Chew Heong* regulated a transaction that included some pre-enactment conduct (obtaining a certificate upon departure) and some post-enactment conduct (return to the United States). 112 U.S. at 538-39. Accordingly, the Chinese laborers in that case could have avoided application of the statute by "refrain[ing] from . . . returning to the United States." BIO 13. But this post-enactment Hobson's choice did not stop the Court from concluding that application of the Chinese Restriction Act would have been retroactive. *Id.* at 559. As the result in *Chew Heong* thus illustrates, the critical question in assessing the retroactivity of a statute must be whether the *primary* activity being regulated occurs prior to the statute's enactment.

Take, for example, a statute banning individuals convicted of sex offenses involving minors from residing within 2,000 feet of a school or child care facility. *See, e.g., Doe v. Miller*, 405 F.3d 700, 704 (8th Cir. 2005). Such a statute would not be impermissibly retroactive as applied to a sex offender convicted prior to the law's passage, because "[t]he primary purpose of the law is not to alter the offender's incentive structure by demonstrating the negative consequences that will flow from committing a sex offense." *Id.* at 720. Rather, such a statute operates mainly prospectively "to reduce the likelihood of reoffense by limiting the offender's temptation and reducing the opportunity to commit a new crime." *Id.* In contrast, the post-enactment conduct at issue in this case (travel) is *not* the

primary target of subsection 101(a)(13)(C)(v). The pre-enactment criminal offense is.

Because "the relevant activity that [subsection 101(a)(13)(C)(v)] regulates" is the commission of an excludable offense "only such relevant activity which occurs *after* the effective date of the statute is covered." *Landgraf*, 511 U.S. at 291 (Scalia J., concurring).

II. THE SECOND CIRCUIT'S REQUIREMENT OF INDIVIDUAL RELIANCE CANNOT BE RECONCILED WITH *LANDGRAF* AND ITS PROGENY.

The Second Circuit followed none of these guideposts, but instead blazed its own trail. In so doing, the court did not quarrel with the notion that subsection 101(a)(13)(C)(v) imposed a new burden on Petitioner based on his pre-IIRIRA offense. Nor did the court dispute that Petitioner's offense was the relevant conduct regulated by subsection 101(a)(13)(C)(v). Rather, the Second Circuit grounded its decision on the assertion that Petitioner could not have *relied* on pre-IIRIRA law at the time he committed his offense.

Specifically, the Second Circuit reasoned that, because subsection 101(a)(13)(C)(v) is worded to refer to "the alien's *commission* of the crime," it would not consider the particularly weighty reliance interests at stake when an alien enters a plea bargain resulting in conviction. Pet. App. 25 (emphasis added). Instead, the court focused solely on the reliance interests implicated when Petitioner decided to *commit* his excludable offense: "it would border on the absurd to suggest that Vartelas committed his counterfeiting crime in reliance on the immigration

laws." Pet. App. 27. Because Petitioner had not actually and specifically relied on the availability of the *Fleuti* doctrine in committing his offense, the court concluded, applying subsection 101(a)(13)(C)(v), while perhaps retroactive, would not be "impermissibly" retroactive, regardless of whether he in fact was convicted through a plea bargain. Pet. App. 28.

That decision is consistent with a line of Second Circuit cases holding that the presumption against retroactivity will apply only where an alien demonstrates actual, subjective, and individual reliance on the prior state of the law. For example, in *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003), the court considered the retroactivity of IIRIRA's repeal of INA § 212(c), which had allowed certain aliens to receive of waiver of deportation. In *St. Cyr.*, this Court held that applying the repeal of § 212(c) to aliens who had previously pleaded guilty to a deportable offense would be retroactive because it "clearly 'attaches a new disability, in respect to transactions or considerations already past.'" 533 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 269). The Second Circuit distinguished this holding, however, because the aliens in *Rankine* had been convicted *at trial* and had not demonstrated individual reliance on the availability of § 212(c) relief:

> First, none of these petitioners detrimentally changed his position in reliance on continued eligibility for § 212(c) relief. Unlike aliens who entered pleas, the petitioners made no decision to abandon any rights and admit guilt . . . .

> Second, the petitioners have pointed to no conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) by going to trial. . . . . Under these circumstances, it is difficult to conclude, *as we must to find impermissible retroactivity*, that the petitioners chose to go to trial in reliance on the availability of § 212(c) relief.

Rankine, 319 F.3d at 99-100 (emphasis added). In sum, the Court reasoned, "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." *Id.* at 99; *see also Restrepo v. McElroy*, 369 F. 3d 627 (2d Cir. 2004) (suggesting that individual reliance could be shown where petitioner alleged that he had foregone an opportunity to file for relief under § 212(c) in subjective reliance on the ability to file later); *Carranza-De Salinas v. Gonzales*, 477 F.3d 200, 205 (5th Cir. 2007) (following *Rankine* and holding that "an applicant who alleges continued eligibility for § 212(c) relief [must] demonstrate *actual, subjective* reliance on the pre-IIRIRA state of the law to be eligible for relief from its retroactive application.") (emphasis added).

But this approach is irreconcilable with this Court's precedents, which do not require any showing of actual reliance by affected parties, let alone the sort of individualized reliance demanded by the Second Circuit. This approach, moreover, ignores that the presumption against retroactivity is a tool of statutory interpretation, which must produce a statute with a single meaning. The Court should expressly reject the Second Circuit's approach and clarify that "reliance" is simply a background

principle animating the presumption against retroactivity and is not a specific and individualized requirement of the doctrine.

A. A Statute's Retroactivity Does Not Require a Showing of Individualized Reliance.

This Court has repeatedly applied the presumption against retroactivity to bar the application of a statute without discussing individual reliance, and where the burdened party could not plausibly have relied on the prior state of the law. In *Landgraf* itself, for example, the Court conducted no individualized analysis of whether the employer, USI Film Products, actually relied on the absence of the punitive and compensatory damages added to Title VII by the newly-enacted law. *See Landgraf*, 511 U.S. at 280-93. Indeed, the Court effectively conceded that it was unlikely *any* employer could have relied on the absence of such damages, given that employment discrimination was already unlawful. *Id.* at 282 n.35 ("[C]oncerns of unfair surprise and upsetting expectations [would be] attenuated in [many] case[s] of intentional employment discrimination, which has been unlawful for more than a generation."). Nonetheless, the Court held that the principles animating the presumption against retroactivity were implicated because "a degree of unfairness is inherent *whenever* the law imposes additional burdens based on conduct that occurred in the past." *Id.* (emphasis added).

Likewise, in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), the Court considered the temporal scope of a 1986 amendment to the False Claims Act ("FCA"), which eliminated a defense to *qui tam* actions based on information

already in the Government's possession. The Court held that the elimination of this defense did not apply to pre-1986 conduct in light of the presumption against retroactivity. *Id.* at 941-42. As in *Landgraf*, however, the relevant conduct (submitting a false claim) had been unlawful for decades. *Id.* at 947. In fact, the elimination of the defense did not really change a party's potential liability *at all*, because the Government could bring the action with that information, and "the monetary liability faced by an FCA defendant is the same whether the action is brought by the Government or by a *qui tam* relator." *Id.* at 948. In such circumstances, it is difficult to see how any business could have detrimentally relied on the fact that inculpatory information was already in the Government's possession. Yet, again, the Court barred application of the new law on retroactivity grounds and did not even discuss reliance.

As the Third Circuit has summarized matters:, "it is unlikely that in *Landgraf* any employer demonstrably relied on the absence of a punitive damages remedy for Title VII violations, or that in *Hughes Aircraft* any government contractor purposely arranged its billing practices ex ante to take advantage of a specific defense under the False Claims Act." *Ponnapula v. Ashcroft*, 373 F.3d 480, 493 (3d Cir. 2004); *see also Olatunji v. Ashcroft*, 387 F.3d 383, 392 (4th Cir. 2004) (Luttig, J.) (noting that *Hughes Aircraft* applied the presumption against retroactivity "without even a single word of discussion as to whether *Hughes Aircraft*—or, for that matter, similarly situated government contractors—had relied on the eliminated defense to its detriment") (emphasis omitted). Indeed, "the Supreme Court has never required actual reliance in

any case in the *Landgraf* line." *Ponnapula*, 373 F.3d at 489.

These cases make clear that *Landgraf's* reference to "fair notice, reasonable reliance, and settled expectations," 511 U.S. at 270, can only be understood as describing the animating principles behind the presumption against retroactivity. This reference in no way defined the doctrine's outer limits. And it certainly did not require an *individualized* showing of reliance. As the Court made perfectly clear in *Hughes Aircraft*, "[t]o the extent respondent contends that *only* statutes with one of these effects are subject to our presumption against retroactivity, he simply misreads our opinion in *Landgraf*. . . . [O]ur opinion in *Landgraf*, like that of Justice Story, merely described that any such effect constituted a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity." 520 U.S. at 947; *see also Olatunji*, 387 F.3d at 394 ("[T]he Supreme Court has *variously articulated* the requirements to show retroactivity, has never insisted upon a reliance requirement, and has consistently concluded that Justice Story's formulation is sufficient for invoking the presumption against retroactivity.") (emphasis in original).

The Second Circuit's requirement that reliance on prior law "must [be proved] to find impermissible retroactivity," *Rankine*, 319 F.3d at 100, is thus flatly inconsistent with the foregoing decisions.

B. The Second Circuit's Approach Would Impermissibly Tie the Meaning of a Statute to Individual Intent and Produce a Statute with No Unitary Meaning.

The Second Circuit's approach to retroactivity is also inconsistent with the basic premise that the presumption against retroactivity is a tool of statutory interpretation. Simply put, the temporal relationship between a statute and regulated conduct does not change based on the state of mind of a particular regulated party. *See Olatunji*, 387 F.3d at 394 ("Whether the particular petitioner did or did not subjectively rely upon the prior statute or scheme has nothing whatever to do with Congress' intent—the very basis for the presumption against statutory retroactivity."). Thus, there is no basis to presume, as the Second Circuit has, that Congress intended a single statute to apply retroactively to some aliens, who have relied on prior law, but not to other aliens, who also engaged in relevant conduct *at the same time*, but without reliance.

To the contrary, there is every reason to believe otherwise. For such a result would violate the well-established rule that a single statute cannot mean different things to different people. "To give the[] same words [in a statute] a different meaning for each category [or individual] would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005); *see also id.* (a statute may be interpreted in one of two ways "[i]t cannot, however, be interpreted to do both at the same time"); *id.* at 386 (applying a different statutory interpretation to different classes of people "would render every statute a chameleon" by "establish[ing] . . . the dangerous principle that judges can give the same statutory text different meanings in different cases").

But this is precisely the approach taken by the Second Circuit. Under *Rankine*, two aliens convicted on the same day for the same crime would be subject to different statutory rules. For the alien convicted at trial, IIRIRA would not operate retroactively and would have eliminated § 212(c) relief. But for the alien convicted by guilty plea, IIRIRA would operate retroactively and would not have eliminated § 212(c) relief. On the Second Circuit's view, "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." *Rankine*, 319 F.3d at 99.

Likewise, in *Restrepo*, the Second Circuit suggested that although an alien convicted at trial had not relied on the availability of § 212(c) when deciding to go to trial, he might have relied on the later availability of such relief by choosing not to file an earlier preemptive petition for § 212(c) relief. 369 F.3d at 632. The Court therefore held that, "on remand, the district court [would] have to make further inquiries in order to determine whether Petitioner may himself claim the benefit of his argument." *Id.* at 633. Thus, in *Restrepo*, the retroactive reach of IIRIRA turned on the subjective intent of an individual alien.

Such results are not consistent with an attempt to determine the temporal scope of a single statute. Instead, they appear to assume that the new statute applies, but then invent an atextual "reliance defense" to that application. As the Fifth Circuit has stated in applying the Second Circuit's test, "an applicant who alleges continued eligibility for § 212(c) relief [must] demonstrate actual, subjective reliance on the pre-IIRIRA state of the law *to be eligible for*

relief from its retroactive application." *Carranza-De Salinas*, 477 F.3d at 205 (emphasis added). But as Judge Luttig explained, the Court's case law:

> asks only whether a statute *in fact* has retroactive effect. . . . Whether the particular petitioner did or did not subjectively rely upon the prior statute or scheme has nothing whatever to do with Congress' intent—the very basis for the presumption against statutory retroactivity . . . . [W]here Congress has apparently given no thought to the question of retroactivity whatever, there is no basis for inferring that Congress' intent was any more nuanced than that statutes should not be held to apply retroactively.

Olatunji, 387 F.3d at 394. "Anything more, in the face of complete congressional silence, is nothing but judicial legislation." *Id.*

* * *

Under the multi-factor approach set out in *Landgraf*, actual reliance by some or all of the affected individuals or businesses would support a non-retroactive interpretation, but is by no means necessary. Moreover, even if some form of reliance were required to find a statute non-retroactive, it could not be a showing of individualized reliance. Rather, the most that could be reconciled with *Landgraf* and *Hughes Aircraft* is a requirement that the legal rule in question be the sort of rule on which an informed observer would rely; that is, the sort of rule that is objectively material. The *Fleuti* doctrine is precisely such a rule, as the ability to travel abroad without risking one's legal status is a deeply significant right for most aliens.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

PANAGIS VARTELAS,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is 8 U.S.C. § 1101(a)(13)(C)(v), which has been interpreted as depriving certain lawful permanent residents of their right to take brief trips abroad without being denied reentry, impermissibly retroactive as applied to lawful permanent residents who pleaded guilty before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)?

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Aptheker v. Sec'y of State,
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Booker v. Commonwealth,
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Bousley v. United States,
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Boykin v. Alabama,
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Brady v. United States,
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Camins v. Gonzales,
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Carmell v. Tex.,
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Commonwealth v. Stanton,
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Corfield v. Coryell,
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Cottle v. State,
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Florida v. Nixon,
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Godinez v. Moran,
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Harris v. State,
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Hughes Aircraft Co. v. United States,
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In re Lethbridge,
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In re Pers. Restraint of Stenson,
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INS v. St. Cyr,
533 U.S. 289 (2001) ..... *passim*

Itzcovitz v. Selective Serv. Local Bd.,
447 F.2d 888 (2d Cir. 1971) 18

Kaiser Aluminum & Chemical Corp. v. Bonjorno,
494 U.S. 827 (1990) 2

Kamheangpatiyooth v. INS,
597 F.2d 1253 (9th Cir. 1979) 18

Kent v. Dulles,
357 U.S. 116 (1958).....16

Lagassee v. State,
No. CR-92-407, 1993 Me. Super. LEXIS 236
(Me. Sup. Ct. Sept. 23, 1993).....19

Landgraf v. USI Film Prod.,
511 U.S. 244 (1994).....*passim*

Libretti v. United States,
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Lindsey v. Washington,
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MacDonald v. State,
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Machibroda v. United States,
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Magana-Pizano v. INS,
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Miller v. Florida,
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Olatunji v. Ashcroft,
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Padilla v. Kentucky,
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People v. Barocio,
264 Cal. Rptr. 573 (Cal. Ct. App. 1989) 19

People v. Manning,
883 N.E.2d 492 (Ill. 2008).....19

People v. Reyes,
No. 678195, 2006 WL 3891499
(N.Y. Sup. Ct. Dec. 14, 2006).....20

Ponnapula v. Ashcroft,
373 F.3d 480 (3d Cir. 2004).....12

Ricketts v. Adamson,
483 U.S. 1 (1987).....28

Rooney v. North Dakota,
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Rosenberg v. Fleuti,
374 U.S. 449 (1963).....*passim*

Santobello v. New York,
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Soc'y for Propagation of the Gospel v. Wheeler,
22 F. Cas. 756 (No. 13,156)
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State v. Bean,
762 A.2d 1259 (Vt. 2000).....20

State v. Donald,
10 P.3d 1193 (Ariz. Ct. App. 2000).....19

State v. Loyd,
190 N.W.2d 123 (Minn. 1971).....19

State v. Paredez,
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State v. Yanez,
782 N.E.2d 146 (Ohio Ct. App. 2002) 20

Strickland v. Washington,
466 U.S. 668 (1984) 19, 20

Sturges v. Carter,
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Union Pac. R.R. Co. v. Laramie Stock Yards Co.,
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United States v. Dominguez-Benitez,
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United States v. Morgan,
406 F.3d 135 (2d Cir. 2005) 32

United States v. Orocio,
645 F.3d 630 (3d Cir. 2011) 19

United States v. Smith,
440 F.2d 521 (7th Cir. 1971) 32

United States v. Timmreck,
441 U.S. 780 (1979) 32

United States v. Vonn,
535 U.S. 55 (2002) 32

Vartelas v. Holder,
620 F.3d 108 (2d Cir. 2010) 25

Waley v. Johnston,
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Walker v. Johnston,
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Warden, Lewisburg Penitentiary v. Marrero,
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Weaver v. Graham,
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Constitutional Provisions

U.S. Const. art. I, § 3, cl. 3
(Ex Post Facto Clause) 8, 9, 12, 15

U.S. Const. amend. V
(Due Process Clause) 8, 30

Statutes and Acts of Congress

8 U.S.C. § 1101(a)(13) (1994) 2, 3

8 U.S.C. § 1101(a)(13)(C)(v) (2000).....*passim*

Illegal Immigration Reform and
Immigrant Responsibility Act of 1996,
Pub. L. No. 104-208, 110 Stat. 3009-546 .....*passim*

Immigration and Nationality Act of 1952,
Pub. L. No. 82-414, 66 Stat. 163

§ 101(a)(13) 2, 3

§ 212(a)(2) 3

§ 212(c).....13

Other Authorities

ABA Standards for Criminal Justice: Pleas of Guilty (3d ed. 1999) 20, 21

Ann Benson, Jonathan Moore & Katherine Brady, Immigration and Washington State Criminal Law (2005).....22

Anna Marie Gallagher, *Immigration Consequence of Criminal Convictions: A Primer on What Crimes Can Get Your Client into Trouble*, in Navigating the Fundamentals of Immigration Law (2009).....21

Assigned Counsel Manual: Policies and Procedures, ch. IV, Guidelines Governing Representation of Indigents in Criminal Cases (Mass. Comm. for Public Counsel Servs. 2009).....21

Black's Law Dictionary (9th ed. 2009).....11

Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006 Statistical Tables* (Dec. 2009).....31

Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses* (Nat'l Immig. Project of the Nat'l Lawyers Guild 2008) 21, 22

Dan Kesselbrenner et al.,
Nat'l Immig. Project of the Nat'l Lawyers Guild, *Immigration Law and Crimes* (June 1995) 23

Dan Kesselbrenner et al.,
Nat'l Immig. Project of the Nat'l Lawyers Guild, *Immigration Law and Crimes* (2011) 21

David C. Koelsch,
Proceed with Caution: Immigration Consequences of Criminal Convictions,
87 Mich. B.J. 44 (2008) 20

Fernando A. Nunez,
Collateral Consequences of Criminal Convictions to Noncitizens,
41 Md. B.J. 40 (Jul./Aug. 2008) 20

Frank H. Easterbrook,
Plea Bargaining as Compromise,
101 Yale L.J. 1969 (1992) 26

Immig. and Naturalization Servs.,
U.S. Dep't of Justice, *1996 Statistical Yearbook of the Immigration and Naturalization Service* (Oct. 1997) 17

Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases
(Or. State Bar 2007) 20

Ira J. Kurzban,
Immigration Law Sourcebook
(5th ed. 1995) 23

Jorge L. Baron,
A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut (2010) 20, 22, 23

Manuel Orozco,
Transnationalism and Development: Trends and Opportunities in Latin America, in Remittances: Development Impact and Future Prospects
(Samuel Munzele Maimbo & Dilip Ratha eds., 2005) 17

Maria Baldini-Potermin,
Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases,
17 Law & Ineq. 567 (1999) 20

Nancy Morawetz,
The Invisible Border: Restrictions on Short-Term Travel for Noncitizens,
21 Geo. Immigr. L.J. 201 (2007).....18

Nancy Rytina,
U.S. Dep't of Homeland Sec., Office of Immig. Statistics, *Population Estimates: Estimates of the Legal Permanent Resident Population in 2009*
(Nov. 2010) 17

Nat'l Immig. Project of the Nat'l Lawyers Guild, *Immigration Law and Defense* (Sept. 1995) 23

Norton Tooby & Joseph Justin Rollin, *Safe Havens: How to Identify and Construct Non-Deportable Convictions* (2005) 21

Norton Tooby, *Criminal Defense of Immigrants* (3d ed. 2003) 21

Performance Guidelines for Criminal Defense Representation (Nat'l Legal Aid and Defender Ass'n 1995) 20

Performance Guidelines for Criminal Defense Representation (N.M. Pub. Defender Dep't 1998) 20

Restatement (Second) of Contracts 29

Robert C. Divine, *Immigration Practice* (1994) 17

Roger Waldinger, Pew Hispanic Center, *Between Here and There: How Attached Are Latino Immigrants to Their Native County?* (2007) 17

Sara Elizabeth Dill, 101 Tips for Representing Non-Citizens in Criminal Proceeding (ABA Young Lawyers Division 2007) 20, 22

Scott E. Bratton,
Nat'l Ass'n of Criminal Def. Lawyers,
Representing a Noncitizen in a Criminal Case, The Champion,
Jan./Feb. 2007 20

The Immigration Consequences of Deferred Adjudication Programs in New York City (Comm. on Criminal Justice Operations, Ass'n of the Bar of the City of N.Y. 2007) 20

Thomas A. Aleinikoff & David A. Martin,
Immigration: Process and Policy
(2d ed. 1991) 23

Thomas A. Aleinikoff & David A. Martin,
Immigration and Citizenship
(2d ed. 1991) 6

Thomson Reuters/West,
2 Crim. Prac. Manual (2011) 21

U.S. Dep't of Justice,
Bureau of Justice Statistics, *Disposition of Criminal Cases Terminated, By Offense, During Oct. 1, 2007-Sept. 30, 2008* (2010) 31

INTEREST OF *AMICI CURIAE*[1]

Amici curiae National Association of Criminal Defense Lawyers, National Legal Aid & Defender Association, Immigrant Defense Project, Immigrant Legal Resource Center, and National Immigration Project of the National Lawyers Guild are leading criminal and immigration defense associations that, among other things, provide training and legal resources to attorneys practicing in the fields or criminal and immigration law. *Amici* have a fundamental interest in the fair and just administration of the immigration statutes relating to the criminal justice system, in accordance with the dictates of the Constitution, the will of Congress, and the decisions of this Court. *Amici* have a particular interest, and vast experience, in providing guidance to lawful permanent residents in criminal proceedings, including legal advice about the immigration consequences of criminal convictions, the options to pursue in plea negotiations, and the ultimate decision whether and under what conditions to plead guilty. More detailed information about individual *amici* is provided in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

The "principle that the legal effect of conduct should ordinarily be assessed under the law that ex-

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici* and their counsel contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief and copies of their letters of consent have been lodged with the Clerk of the Court.

isted when the conduct took place has timeless and universal appeal." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). In *Landgraf v. USI Film Prod.*, this Court articulated a two-step process for determining the intended temporal reach of a statute. First, a court looks to whether "Congress has expressly prescribed the statute's proper reach." 511 U.S. 244, 280 (1994). If Congress has done so, the inquiry ends. If not, the second step is to apply the presumption against retroactivity. The law will not be applied to "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.*; *see also Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (C.C.N.H. 1814) (Story, J.) ("[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective.").

The version of Section 101(a)(13) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 ("INA") in effect until 1997 stated that "an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure . . . was not intended." *See* 8 U.S.C. § 1101(a)(13) (1994). In *Rosenberg v. Fleuti*, this Court construed this statute to exempt as "not intended" any "innocent, casual, and brief trips abroad." 374 U.S. 449, 461–62 (1963). Therefore, the statute permitted those who previously earned lawful permanent resident status

to take short trips abroad, for such things as attending to family obligations, even if something new in their background would now make them ineligible under the immigration law for an initial entry to the United States.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), as interpreted by the government, altered this regime. According to the Board of Immigration Appeals' interpretation of the amendments to INA § 101(a)(13), under IIRIRA (which now defines "admission" as opposed to "entry"), the ability to return to the United States, even after "innocent, casual, and brief" trips abroad, is now limited to those lawful permanent residents who have not committed offenses identified in INA § 212(a)(2), such as a crime of moral turpitude. *See* IIRIRA § 301(a) (amending INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994)).[2]

Petitioner in this case is like many lawful permanent resident immigrants whom *amici* have represented or counseled in criminal proceedings over the past few decades, immigrants with long-lasting ties to this country that, not surprisingly, they very much wish to preserve. Petitioner entered the United States in 1981 on a student visa and became a

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[2] This Court has not decided whether the IIRIRA amendments repeal, in whole or in part, the right that *Fleuti* recognized in the Immigration and Nationality Act. This brief does not address this question, instead focusing on whether the IIRIRA amendments, as interpreted by the government, may be applied retroactively to abrogate the *Fleuti* rights of lawful permanent residents who pleaded guilty before IIRIRA.

lawful permanent resident of the United States in 1989. When he later was charged with a crime of moral turpitude (conspiracy to make or possess a counterfeit security), he agreed to plead guilty to the charge. Under the law then in effect, petitioner retained the right to make brief trips abroad and return to the United States without subjecting himself to the restrictions that apply to those seeking "entry" or "admission" to the country within the meaning of the immigration laws—restrictions that, if applied to petitioner and others like him, would bar their ability to travel and return to this country.

Like others whom *amici* have represented and counseled, petitioner later needed to travel abroad. In January 2003, he spent a week in his native Greece to assist his elderly parents with their family business. Two months after his return home, the government initiated removal proceedings. The government, invoking its interpretation of 8 U.S.C. § 1101(a)(13)(C)(v) (2000), contended that because of petitioner's pre-IIRIRA guilty plea, *any* departure from the country—however brief—triggered the rules governing admissibility when petitioner returned to his home in the United States. Moreover, under the government's view, the same guilty plea rendered petitioner inadmissible (and therefore removable).

This case illustrates three errors in the government's view of the retroactive reach of Section 1101(a)(13)(C)(v). Each justifies reversal.

1. Contrary to the reasoning by the court below, the answer to whether a statute would have a retroactive effect—that is, an effect that the courts will impute to Congress only where there is unmistakable evidence of such a purpose—does not turn on whether the individual bringing the challenge can prove his

or her own reliance on the previous law. Rather, the retroactivity analysis is an inquiry into whether Congress intended for new legal consequences to attach to a category of conduct that predated the statute. This Court has never attributed to Congress a dual-track intent in which the statute would apply prospectively only to those who can prove they personally relied on the old law, with retrospective application for everyone else. Nothing about the statute at issue here warrants inventing and applying the government's proposed rule. Because Section 1101(a)(13)(C)(v) attaches new legal consequences to the commission of certain offenses, as well as to the decision to plead guilty to those offenses, it is retroactive in its application. *See infra* 8–15.

2. This is not to say that considerations of reliance and fair notice play *no* role in the Court's retroactivity analysis. Although reliance is not a prerequisite, the fact that many of those affected by the determination are likely to have been aware of the previous law and to have ordered their conduct accordingly, serves as overwhelming confirmation that the statute has a retroactive effect under *Landgraf*.

It would be wrong to assume that lawful permanent residents who pleaded guilty pre-IIRIRA to crimes involving moral turpitude placed no significance on their continuing ability, post-conviction, to make brief, innocent, and casual trips abroad. *See* BIO 9–10. Non-citizen defendants "considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *INS v. St. Cyr*, 533 U.S. 289, 322 (2001). Bar journals, treatises, and leading criminal and immigration defense organizations—including *ami-*

ci—regularly counsel defense attorneys to consider these consequences in rendering advice to their clients, and to structure plea agreements wherever possible to avoid both deportation and denial of reentry. *See infra* 15–22.

This should come as no surprise. Lawful permanent residents travel with great frequency to their native countries to visit ailing family members, to attend major life events such as births and funerals, and to pursue their livelihoods. The ability to return to the United States following a brief trip abroad was a well-known statutory right that, prior to IIRIRA, had "become firmly embedded in the law." Thomas A. Aleinikoff & David A. Martin, *Immigration and Citizenship* 462 (2d ed. 1991). If those like petitioner had known that they would be stripped of this ability by subsequent government action, their attorneys could have negotiated for a guilty plea that avoided this consequence, and—barring an acceptable agreement—could have advised on whether to put the government to its proof at trial. *See infra* 23–25.

3. The fact that the prior conduct here involves guilty pleas heightens the need for special care before imputing to Congress the intent to strip those like petitioner of the ability to travel and then return to their home in this country. As in *St. Cyr*, petitioner agreed to plead guilty to an offense, forfeiting his Fifth and Sixth Amendment rights to a jury trial where he could confront witnesses and invoke his privilege against self-incrimination; in exchange, he accepted responsibility for the commission of an offense that would not prevent him from taking short trips out of the country.

The success of the plea bargaining system hinges on the confidence of both parties—prosecutors and

defendants—in the benefit of the bargain struck. *See generally Brady v. United States*, 397 U.S. 742, 753 (1970); *see also, e.g., Santobello v. New York*, 404 U.S. 257, 262–63 (1971) (government must honor promises made in exchange for the plea). Where the government later upsets the negotiated balance by legislating a change in the bargain's consequences—as the retroactive application of 8 U.S.C. § 1101(a)(13)(C)(v) would do—the mutual advantage from pleading guilty is seriously disrupted. That result would raise substantial constitutional questions and erode confidence in the plea system. *See infra* 26–32. This Court often has expressed concern for such destabilization when it is the defendant who seeks to revisit the terms of a completed plea bargain. The result should be no different when the government seeks to impute from Congress's silence an intent to upset the expectations of the parties to plea agreements, especially in a manner that stretches constitutional limits to the breaking point.[3]

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[3] This brief—like the decision below—focuses on the second step of the *Landgraf* analysis: whether the statute has a retroactive effect that the Court will apply only if Congress was clear that it intended as much. *Amici* agree with petitioner, however, that the Court need not reach step two. It is clear that Congress wrote the statute with the understanding that Section 1101(a)(13)(C)(v) would apply only to those who commit moral turpitude offenses after IIRIRA's effective date; otherwise, of the universe of lawful permanent residents who have ever obtained discretionary relief from removal, only those who obtained that relief *pre*-IIRIRA would be subjected to the *post*-IIRIRA removal proceedings. *See* Petr's Br. 20–21 n.3. That result—which would introduce to the law the concept of a "grandchild clause"—is exactly the opposite of what the presumption against retroactivity dictates.

ARGUMENT

I. RETROACTIVITY IS DETERMINED IN BOTH THE CRIMINAL AND CIVIL CONTEXTS BY INQUIRING WHETHER CONGRESS INTENDED FOR NEW LEGAL CONSEQUENCES TO ATTACH TO PRIMARY CONDUCT PREDATING THE RELEVANT STATUTE, AND DOES NOT DEPEND ON PROOF THAT AN INDIVIDUAL LITIGANT RELIED ON PRIOR LAW

1. Under *Landgraf* and echoing throughout this Court's retroactivity jurisprudence, the determination whether a law would have retroactive effect turns on "whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. This formulation, rooted in the Due Process and Ex Post Facto Clauses, *id.* at 266, draws on this Court's long line of retroactivity cases in both criminal and civil contexts, *e.g.*, *Miller v. Florida*, 482 U.S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date'") (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981)); *Sturges v. Carter*, 114 U.S. 511, 519 (1885) (statute is impermissibly retroactive when it "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability'") (quoting *Soc'y for the Propagation of the Gospel*, 22 F. Cas. at 767), and it has been reaffirmed in every retroactivity decision since *Landgraf*. *See, e.g.*, *St. Cyr*, 533 U.S. at 321 ("The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.") (citation and quotation marks omitted);

Hughes Aircraft Co. v. United States, 520 U.S. 939, 947 (1997) (same).

Under this Court's Ex Post Facto jurisprudence, reliance is manifestly *not* a prerequisite to retroactivity. *See Carmell v. Tex.*, 529 U.S. 513, 533–534 (2000) ("Fenwick could claim no credible reliance interest in the two-witness statute . . . . [Nevertheless,] there was a profound unfairness in Parliament's retrospectively altering the very rules it had established . . . . The Framers, quite clearly, viewed such maneuvers as grossly unfair, and adopted the Ex Post Facto Clause accordingly."). This Court's retroactivity analysis in the civil context, which is "borrowed directly from [the Court's] Ex Post Facto Clause jurisprudence," *Landgraf*, 511 U.S. at 290 (Scalia. J., concurring), is no different.

In *Landgraf*, for example, this Court held that Section 102(a)(1) of the Civil Rights Act of 1991, which authorized the recovery of compensatory damages for intentional discrimination violating Title VII, was impermissibly retroactive because it would "undoubtedly impose on employers found liable a 'new disability' in respect to past events." 511 U.S. at 283 (quoting *Soc'y for the Propagation of the Gospel*, 22 F. Cas. at 767). Only as additional support for this finding did the Court note that "[t]he introduction of a right to compensatory damages is also the type of legal change that would have an impact on private parties' planning," thereby invoking the concept of reliance. *Id.* at 282. The Court never placed emphasis on the parties' reliance, nor did it explicitly require reliance in order to hold that the law was impermissibly retroactive.

That explains why, when applying *Landgraf* three years later in *Hughes Aircraft Co.*, this Court

was silent on the issue of reliance. 520 U.S. 939 (1997). The Court rested its opinion on the fact that the law in question "changes the substance of the existing cause of action . . . by 'attaching a new disability, in respect to transactions or considerations already past,'" and it did so without addressing whether Hughes Aircraft could show that it relied on the old law. *Id.* at 948 (quoting *Landgraf*, 511 U.S. at 269).

This Court's ruling in *St. Cyr* followed the same approach to retroactivity in the immigration context. The Court there began its "inquiry into whether a statute operates retroactively" by invoking the *Society for Propagation of the Gospel* test, as quoted in *Landgraf*: "A statute has retroactive effect when it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'" *St. Cyr*, 533 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 269). Only then did the Court add that it is helpful to be "*informed and guided* by familiar considerations of fair notice, reasonable reliance, and settled expectations" in making this determination. *Id.* (internal citations omitted) (emphasis added).[4]

This Court's most recent discussion of retroactivity in the immigration context likewise confirms

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[4] *See also St Cyr*, 533 U.S. at 324 ("And our mere statement that deportation is not punishment for past crimes does not mean that we cannot *consider* an alien's reasonable reliance on the continued availability of discretionary relief from deportation when deciding whether the elimination of such relief has a retroactive effect.") (emphasis added).

that, while evidence of reliance can help to show a retroactive effect, such proof is not necessary. In *Fernandez-Vargas v. Gonzales*, this Court explained that it found a retroactive effect in *St. Cyr*—the addition of a new burden to the result of pre-enactment guilty pleas—because "converting deportation from a likely possibility to a dead certainty would add such a burden, and application of the new law was accordingly barred." 548 U.S. 30, 43 (2006). It was the added burden—not proof of St. Cyr's reliance on the absence of that burden at the time of his plea—that gave the new law a retroactive effect. *See id.* at 37.

2. To place controlling weight on whether a particular litigant can prove he relied on the previous law would be a curious way to divine whether "the manifest intention of the legislature," *Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913), was for the new law to apply to all those whose conduct pre-dated the new law. Such a nuanced result cannot be squared with the fact that step two of *Landgraf* is reserved for cases where Congress did not even think to legislate on the question. *See Olatunji v. Ashcroft*, 387 F.3d 383, 389–90 (4th Cir. 2004).

A reliance requirement as a prerequisite to a determination of retroactivity is also inconsistent with the burden-shifting inherent in the presumption against retroactivity. A presumption is a "legal inference or assumption that a fact exists" that "shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." Black's Law Dictionary 1304 (9th ed. 2009). In other words, the government has the burden of overcoming the initial inference in favor of prospective-only application before that law will op-

erate retroactively. Applying reliance as a prerequisite in the retroactivity analysis alters this careful allocation of burdens. It arms the government with the presumption that all laws may be applied retroactively unless litigants can prove that they actually relied on the consequences that attached to the earlier law. That misguided reading of *St. Cyr* would squarely contradict this Court's precedent on retroactivity in civil cases, as well as divorce that jurisprudence from its grounding in the Ex Post Facto Clause. *See supra* 9; *St. Cyr*, 533 U.S. at 325 (citing, *inter alia*, *Lindsey v. Washington*, 301 U.S. 397 (1937), an Ex Post Facto case); *see also Ponnapula v. Ashcroft*, 373 F.3d 480, 490 (3d Cir. 2004).

Finally, requiring each litigant to make a particularized showing of reliance would lead to onerous and, inevitably, inequitable consequences. Every litigant to whom a retroactive law may apply would need to search for case-specific proof that she relied on the old law—proof that often would be years old (as would be true in this case, where the removal notice post-dated the guilty plea by a decade). And the government would inevitably raise individualized challenges to each proffered retroactivity claim, as it does in this case, with a burdensome strain on litigants and on the dockets of federal courts. Moreover, such individual adjudications based on sparse and mostly indirect evidence are likely to lead to disparate results, thereby increasing the inequities between individuals who are similarly situated.

3. This case highlights three distinct ways in which IIRIRA's purported repeal of the right recognized in *Fleuti* attaches new legal consequences to acts completed before the new law went into effect, and is therefore retroactive in its application. *First*,

it impairs a vested right to travel abroad for brief, innocent, and causal trips. *Second*, it imposes a greater penalty upon past conduct. *Third*, it abolishes a previously available affirmative defense.

a. Applying 8 U.S.C. § 1101(a)(13)(C)(v) as interpreted by the government here would take away a statutory right to brief, innocent, and casual travel abroad—a right that immigrants who pleaded guilty prior to IIRIRA had at the time of their pleas. *See, e.g., Soc'y for Propagation of the Gospel*, 22 F. Cas. at 767 ("[E]very statute, which takes away or impairs vested rights . . . "). That effect is more certain than the one this Court declined to impute to Congress in *St. Cyr*, where the Court found that "IIRIRA's elimination of any *possibility* of § 212(c) relief for people who entered into plea agreements . . . clearly attaches a new disability in respect to [the guilty plea]." 533 U.S. at 321 (emphasis added) (internal citations omitted). Even though there was no guarantee that the Attorney General would exercise his discretion in favor of any particular lawful permanent resident, the Court held that the denial of just the chance for discretionary relief would be improperly retroactive. Here, the government would interpret Section 1101(a)(13)(C)(v) to remove a *certain* preexisting right to make "innocent, casual, and brief" trips abroad. Because there is no question that the substantive rights of lawful permanent residents would change, the presumption against retroactive application of this law applies.

b. Application of the government's view of 8 U.S.C. § 1101(a)(13)(C)(v) to those immigrants who pleaded guilty prior to IIRIRA would also impermissibly increase liability for past conduct. *See, e.g., Fernandez-Vargas*, 548 U.S. at 37 ("Statutes are dis-

favored as retroactive when their application would . . . increase a party's liability for past conduct . . . ."). Section 1101(a)(13)(C)(v) imposes a greater penalty upon prior adjudicated conduct. In particular, the new law precludes *any* foreign travel by a lawful permanent resident who intends to retain that status and who pleaded guilty to a designated offense before the change in law. Those who have entered such pleas and leave the country for any length of time whatsoever will be subject to either denial of re-admission or removal from the country. Thus, while deportation is not considered a formal "punishment" for past crimes, *St. Cyr*, 533 U.S. at 324, its imposition here would be an increased disability for someone whose punishment already has been imposed. *Cf. Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010) ("deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes") (footnote omitted). That also triggers the presumption against retroactivity.

c. Finally, application of the government's view of 8 U.S.C. § 1101(a)(13)(C)(v) to immigrants who pleaded guilty prior to IIRIRA would abolish the affirmative defense to removal, recognized in *Fleuti*, of having made only an "innocent, casual, and brief" trip abroad; as a result, these lawful permanent residents would be subject to the entry and admission provisions of the INA upon their return. *See, e.g.*, *Hughes Aircraft*, 520 U.S at 948 ("[the statute] eliminates a defense . . . and therefore . . . 'attach[es] a new disability, in respect to transactions or consideration already past'") (quoting *Landgraf*, 511 U.S. at 269). This result, like the elimination of the *qui tam* defense in *Hughes Aircraft*, "changes the substance of the existing cause of action" (*id.*) for removal: If a

lawful permanent resident is convicted of a crime listed as a ground for inadmissibility, that resident can now be removed after any departure from the country whatsoever. *Cf. Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 663 (1974) ("a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause . . . of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the . . . offense'") (quoting *Rooney v. North Dakota*, 196 U.S. 319, 325 (1905)). To strip this defense through the application of Section 1101(a)(13)(C)(v) would be impermissibly retroactive.

II. THE AVAILABILITY OF REENTRY FOLLOWING A BRIEF, CASUAL, AND INNOCENT TRIP ABROAD WAS A WELL-KNOWN AND VERY IMPORTANT RIGHT ON WHICH IT WAS REASONABLE FOR LAWFUL PERMANENT RESIDENTS TO RELY PRE-IIRIRA WHEN THEY PLEADED GUILTY AND WAIVED IMPORTANT CONSTITUTIONAL RIGHTS

Although this Court has never required that an individual litigant prove his reliance on prior law before a court will apply the presumption against retroactivity, *supra* at 8–15, this "does not mean that [the Court] cannot consider an alien's reasonable reliance" on the continued availability of relief from immigration consequences "when deciding whether the elimination of such relief has a retroactive effect." *St. Cyr*, 533 U.S. at 324. In fact, widespread reliance on a statutory right or limitation is a powerful indicator that a change in the state of the law would have a retroactive effect if applied to past conduct. *Id.* at 325; *see also Landgraf*, 511 U.S. at 270

(suggesting that "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in determining retroactivity).

Here, the experience of *amici* is that lawful permanent residents whom their members represented or counseled in pre-IIRIRA criminal proceedings reasonably relied on the opportunity to continue taking short trips abroad—particularly in weighing plea offers and entering guilty pleas. Treatises, and other guidance from leading criminal and immigration defense organizations—including *amici*—educated lawful-permanent-resident defendants, through their criminal defense lawyers and immigration law expert consultants, that brief trips abroad would not subject them to grounds for excludability (now inadmissibility) upon their return. *See infra* 18–24.

1. Freedom of movement is a fundamental right, *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230), and "an important aspect of the citizen's 'liberty.'" *Kent v. Dulles*, 357 U.S. 116, 127 (1958). "Freedom of movement *across frontiers* . . . [is] a part of our heritage" that, "like travel within the country, . . . may be as close to the heart of the individual as the choice of what he eats, or wears, or reads." *Id.* at 126 (emphasis added). The right to travel, "at home and abroad, is important for job and business opportunities—for cultural, political, and social activities—for all the commingling which gregarious man enjoys." *Aptheker v. Sec'y of State*, 378 U.S. 500, 519–20 (1964) (Douglas, J., concurring).

As important as the ability to travel is to citizens, it has particular significance to the lives of lawful permanent residents. Having emigrated to the United States, these individuals "often have continuing ties and interests abroad," including significant

family and personal commitments in their home countries, and in fact "tend to travel internationally more than most Americans." Robert C. Divine, *Immigration Practice* § 9-2(c) (1994). More than 12.5 million lawful permanent residents resided in the United States as of January 1, 2009.[5] A significant percentage were admitted before IIRIRA's enactment: Over 7.5 million lawful permanent residents were admitted to the United States between 1990 and 1996 alone.[6]

A great many still have family members and close friends in their countries of origin. One-third of all non-citizens travel to their home countries at least once a year, Manuel Orozco, *Transnationalism and Development: Trends and Opportunities in Latin America, in Remittances: Development Impact and Future Prospects* 307, 313 (Samuel Munzele Maimbo & Dilip Ratha eds., 2005), and sixty-five percent of Latino immigrations have made at least one trip back to their native county since moving to the United States, Roger Waldinger, Pew Hispanic Center, *Between Here and There: How Attached Are Latino Immigrants to Their Native County?* 4 (2007). Funerals, weddings, births, and the need to care for ailing family members represent just a few of the significant reasons immigrants travel to their homelands. *See* Nancy Morawetz, *The Invisible Border:*

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[5] Nancy Rytina, U.S. Dep't of Homeland Sec., Office of Immig. Statistics, *Population Estimates: Estimates of the Legal Permanent Resident Population in 2009*, at 1 (Nov. 2010).

[6] Immig. and Naturalization Servs., U.S. Dep't of Justice, *1996 Statistical Yearbook of the Immigration and Naturalization Service*, 25 tbl. 1 (Oct. 1997).

Restrictions on Short-Term Travel for Noncitizens, 21 Geo. Immigr. L.J. 201, 219-27 (2007); *see also, e.g., Kamheangpatiyooth v. INS*, 597 F.2d 1253, 1257–59 (9th Cir. 1979) (discussing lawful permanent resident's month-long visit to Thailand to care for gravely ill mother). And in many cases, "whether [a noncitizen] would be able to keep his job, much less advance himself, without going [abroad] is doubtful." *Itzcovitz v. Selective Serv. Local Bd.*, 447 F.2d 888, 894 (2d Cir. 1971).

2. "There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *St. Cyr*, 533 U.S. at 322; *see also, e.g., Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999) ("That an alien . . . would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented."). No properly advised lawful permanent resident would elect to plead guilty without carefully considering the immigration consequences.

"[P]reserving the . . . right to remain in the United States may be more important to [an immigrant] than any potential jail sentence," *St. Cyr*, 533 U.S. at 323, and, in fact, "the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty[.]" *Padilla*, 130 S. Ct. at 1486. A lawful permanent resident may also make the rational choice of going to trial—accepting the risk of a more severe criminal sentence—to keep open the possibility of remaining in the United States. *See United States v. Orocio*, 645 F.3d 630, 645 (3d Cir. 2011) (noting that the defendant rationally could have been more con-

cerned about banishment from the U.S. than the possibility of spending a decade in prison).

In *Padilla*, this Court held that counsel has a duty under the Sixth Amendment to inform a non-citizen criminal defendant of the deportation consequences of a guilty plea. 130 S. Ct. at 1486. Professional norms also impose a broader obligation on counsel to provide advice on the immigration consequences of a non-citizen's plea, as evidenced by American Bar Association standards,[7] criminal and

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[7] *See, e.g.*, ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2(f) (3d ed. 1999) ("defense counsel should determine and advise the defendant . . . [as to] possible collateral consequences") and cmt. at 127 ("counsel should be familiar with the basic immigration consequences . . . in investigating law and fact and advising the client"). This Court has regularly looked to ABA standards in determining prevailing professional norms of effective representation, *see, e.g., Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Florida v. Nixon*, 543 U.S. 175, 191 (2004), "especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." *Padilla*, 130 S. Ct. at 1482. The state courts also have regularly looked to the ABA Standards for Criminal Justice, and often specifically to the Pleas of Guilty standards, in evaluating attorney conduct. *See, e.g., State v. Donald*, 10 P.3d 1193, 1198–99 (Ariz. Ct. App. 2000); *People v. Barocio*, 264 Cal. Rptr. 573, 577, 579 (Cal. Ct. App. 1989); *MacDonald v. State*, 778 A.2d 1064, 1071–72, 1075 (Del. 2001); *Cottle v. State*, 733 So. 2d 963, 966 (Fla. 1999); *People v. Manning*, 883 N.E.2d 492, 502 (Ill. 2008); *Lagassee v. State*, No. CR-92-407, 1993 Me. Super. LEXIS 236, at *2–5 (Me. Sup. Ct. Sept. 23, 1993); *Commonwealth v. Stanton*, 317 N.E.2d 487, 490 n.3 (Mass. App. Ct. 1974); *State v. Loyd*, 190 N.W.2d 123, 124 (Minn. 1971); *State v. Paredez*, 101 P.3d 799, 805 (N.M. 2004); *People v. Reyes*, No. 678195, 2006 WL 3891499, at *6 (N.Y. Sup. Ct. Dec. 14, 2006); *State v. Yanez*, 782 N.E.2d 146, 154–55 (Ohio Ct. App. 2002); *Harris v. State*, 875 S.W.2d 662, 665 (Tenn.

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immigrant defense guidelines published by *amici* submitting this brief,[8] numerous state and local bar publications and practice guides,[9] and authoritative

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1994); *State v. Bean*, 762 A.2d 1259, 1266 (Vt. 2000); *Booker v. Commonwealth*, No. 1325-07-2, 2008 WL 926246, at *3 (Va. Ct. App. Apr. 8, 2008); *In re Pers. Restraint of Stenson*, 16 P.3d 1, 15–16 (Wash. 2001). *But see Padilla*, 130 S. Ct. at 1482 (while ABA standards are "valuable," they are "'only guides'" in determining prevailing norms) (quoting *Strickland*, 466 U.S. at 688).

[8] *See, e.g., Performance Guidelines for Criminal Defense Representation* §§ 2.2(b)(2)(A) & 6.2(a)(3) (Nat'l Legal Aid and Defender Ass'n 1995); Scott E. Bratton, Nat'l Ass'n of Criminal Def. Lawyers, *Representing a Noncitizen in a Criminal Case*, The Champion, Jan./Feb. 2007, at 61.

[9] *See, e.g., Performance Guidelines for Criminal Defense Representation* §§ 6.2–6.4 (N.M. Pub. Defender Dep't 1998); Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 Law & Ineq. 567 (1999); *The Immigration Consequences of Deferred Adjudication Programs in New York City* (Comm. on Criminal Justice Operations, Ass'n of the Bar of the City of N.Y. 2007); David C. Koelsch, *Proceed with Caution: Immigration Consequences of Criminal Convictions*, 87 Mich. B.J. 44, 45–46 (2008); Fernando A. Nunez, *Collateral Consequences of Criminal Convictions to Noncitizens*, 41 Md. B.J. 40, 42 (Jul./Aug. 2008); *Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases* § 2.8 (Or. State Bar 2007); Jorge L. Baron, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut* (2010); *Assigned Counsel Manual: Policies and Procedures*, ch. IV, Guidelines Governing Representation of Indigents in Criminal Cases § 5.4(o) (Mass. Comm. for Public Counsel Servs. 2009); *see also* Sara Elizabeth Dill, 101 Tips for Representing Non-Citizens in Criminal Proceeding, at 3 (ABA Young Lawyers Division 2007) ("it is imperative that

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treatises.[10] And at least 28 states and the District of Columbia require courts to advise non-citizen criminal defendants of the possible immigration consequences of their pleas. *Padilla*, 130 S. Ct. at 1491. This makes sense, as "it may well be that many [defendants'] greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2(f) cmt. at 127 (3d ed. 1999).

In cases involving non-citizens, informed defense counsel is often able to structure the plea agreement to avoid severe immigration consequences. *See, e.g.*, Norton Tooby & Joseph Justin Rollin, *Safe Havens: How to Identify and Construct Non-Deportable Convictions* (2005); Anna Marie Gallagher, *Immigration Consequence of Criminal Convictions: A Primer on What Crimes Can Get Your Client into Trouble*, in Navigating the Fundamentals of Immigration Law 403, 415–17 (2009); Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses* (Nat'l Immig. Project of the Nat'l Lawyers Guild 2008) (charting varying adverse immigra-immigration consequences that flow from plethora of federal offenses).

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defense counsel speak at length with non-citizen clients about possible [immigration] consequences").

[10] *See, e.g.*, Norton Tooby, *Criminal Defense of Immigrants* § 1.3 (3d ed. 2003); Dan Kesselbrenner et al., Nat'l Immig. Project of the Nat'l Lawyers Guild, *Immigration Law and Crimes* § 4:7 (2011); Thomson Reuters/West, 2 *Crim. Prac. Manual* §§ 45:3, 45:15 (2011).

If lawful permanent residents facing charges pre-IIRIRA had known that a conviction would bar readmission to the United States after any trip (however brief and however urgent) to their country of origin, they would have considered a very different set of options. These include the exploration of different offenses as part of a guilty plea—for example, assault instead of aggravated assault (Dill, *supra*, at reference chart 4); transportation of a firearm instead of transfer of a firearm for unlawful purposes (Kesselbrenner & Lin, *supra*, at 9); or possession of drug paraphernalia instead of possession with intent to distribute (Baron, *supra*, at 62). Here, for example, petitioner's counsel could have pursued a plea to possession of counterfeit securities in violation of 18 U.S.C. § 474, which in relevant part does not include an intent to defraud and therefore is not a crime involving moral turpitude (*see* Kesselbrenner & Lin, *supra*, at 6; *In re Lethbridge*, 11 I. & N. Dec. 444 (B.I.A. 1965)). And where the only option is an offense involving moral turpitude, the defendant may very well choose to put the prosecution to its proof at trial.[11]

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[11] Post-IIRIRA practitioners' guides for criminal defense lawyers do indeed stress the importance of confining the guilty plea, wherever possible, to offenses that could not be categorized as triggering inadmissibility (such as crimes involving moral turpitude) in part because such offenses would now bar readmission, under the BIA's interpretation of IIRIRA, even after only brief trips abroad. *See, e.g.*, Baldini-Potermin, *supra*, at 608; Ann Benson, Jonathan Moore & Katherine Brady, Immigration and Washington State Criminal Law 53–59 (2005); Baron, *supra*, at app. B (chart advising attorneys how to reframe crimes in plea bargaining). Competent counsel are under a duty to avail themselves of such resources.

3. Although there is no need for litigants to prove reliance before invoking the presumption against retroactivity, this Court in *St. Cyr* "emphasized that plea agreements involve a *quid pro quo* between a criminal defendant and the government," creating a "focus of expectation and reliance," *Fernandez-Vargas*, 548 U.S. at 43–44—and, particularly, "rel[iance] upon settled practice [and] the advice of counsel" at the time of the plea. *St. Cyr*, 533 U.S. at 323.

The availability of reentry following a brief, casual, and innocent trip abroad was a well-known right under *Fleuti* that, prior to IIRIRA, had "become firmly imbedded in the law." Thomas A. Aleinikoff & David A. Martin, *Immigration: Process and Policy* 462 (2d ed. 1991); *see also, e.g.*, Ira J. Kurzban, *Immigration Law Sourcebook* 27–28 (5th ed. 1995) (opportunity for reentry under *Fleuti* is "significant in determining the rights of [lawful permanent residents]"); Nat'l Immig. Project of the Nat'l Lawyers Guild, *Immigration Law and Defense* § 6.4 (Sept. 1995) (discussing *Fleuti*). And it was likewise "critical" for counsel "to consult the standard articulated in *Fleuti* and its progeny" in representing non-citizen defendants. Dan Kesselbrenner et al., Nat'l Immig. Project of the Nat'l Lawyers Guild, *Immigration Law and Crimes* § 5.2(d) (June 1995).

As a result, a "limitation on the ability to travel outside the United States is one of the immigration consequences of which [lawful-permanent-resident] defendants considering whether to enter into a plea agreement would be acutely aware." *Camins v. Gonzales*, 500 F.3d 872, 884 (9th Cir. 2007) (internal quotation marks omitted); *see also Olatunji v. Ashcroft*, 387 F.3d 383, 397 (4th Cir. 2004) ("an alien . . .

could reasonably have considered the ramifications of his guilty plea on his immigration status, including its implications for travel abroad"). In this context, "'aliens who accepted a plea agreement prior to IIRIRA could reasonably have relied on their continuing ability to take brief trips abroad.'" *Camins*, 500 F.3d at 884 (quoting *Olatunji*, 387 F.3d at 397).

The government misses the mark when it argues that a pre-IIRIRA guilty plea does not "reflect[] . . . a *quid pro quo* agreement" and that the plea is not a "'past act that [the defendant] is helpless to undo.'" BIO 9–10, 13 (quoting *Fernandez-Vargas*, 548 U.S. at 44). To the contrary, this Court in *Fernandez-Vargas* made clear that its holding in *St. Cyr* was compelled by the fact that the defendant in *St. Cyr*—unlike the defendant in *Fernandez-Vargas*—pleaded guilty based on the state of the law at the time of his plea, prior to the intervening statute. This Court "emphasized that plea agreements 'involve a *quid pro quo* between a criminal defendant and the government,' in which a waiver of 'constitutional rights . . .' had been exchanged for a 'perceived benefit.'" *Fernandez-Vargas*, 548 U.S. at 43–44 (quoting *St. Cyr*, 533 U.S. at 321–22). And it made clear that St. Cyr's "agreement . . . and his plea were entirely past, and there was no question of undoing them." *Id.* at 44.

As the Court recognized in *St. Cyr*, lawful-permanent-resident defendants often make a *quid pro quo* agreement with the prosecutor: In exchange for a waiver of constitutional rights, including the right to trial by jury and against self-incrimination, a defendant can receive sentence credit for accepting responsibility for her offense and a further "perceived benefit" (*St. Cyr*, 533 U.S. at 322) that, after pleading guilty, she would be able to continue mak-

ing brief trips abroad. As this case illustrates, it is of no moment that IIRIRA uses language relating to "commission of" the offense. BIO 10–11. Here, the government conceded that the only evidence of petitioner's commission was "his guilty plea." BIO 11 n.2.[12] States and the federal government have made countless agreements with lawful permanent residents, with the resulting guilty pleas "completed," well before the new statute passed. *See Fernandez-Vargas*, 548 U.S. at 46 ("the branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts"). Each of those guilty pleas—which are the mode of conviction for the vast majority of state and federal defendants—is a "past act that he is helpless to undo," and on which IIRIRA placed "new burdens."

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[12] In any event, the statute likewise imposes retroactive burdens on the "commission" of a crime involving moral turpitude. The lower court's skepticism about "any claim that the [lawful permanent resident] reasonably relied on the immigration laws in deciding to break the criminal laws," *Vartelas v. Holder*, 620 F.3d 108, 121 (2d Cir. 2010), is nothing less than a flat rejection of two of our legal system's basic premises: that individuals will order their affairs mindful of the full consequences of running afoul of the law, and that it is fundamentally unfair to alter those consequences after the fact. *See, e.g.*, *Carmell*, 529 U.S. at 531 & n.21 (stating that a new law that "increases . . . punishment" for previously committed crimes is impermissibly retroactive and violates principles of "fundamental justice," even though "there are few, if any, reliance interests in planning future criminal activities based on the expectation of less severe repercussions").

III. The Retroactive Application Of Section 1101(a)(13)(C)(v) Would Be Inconsistent With Constitutional Plea Bargain Safeguards And With The Practical Functioning Of The Plea Process.

A guilty plea involves an exchange between a criminal defendant and the government. *See Brady*, 397 U.S. at 753. For her part, the pleading defendant waives significant constitutional rights: her right to trial by jury and to confront the witnesses against her, for example, and her privilege against self-incrimination. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969). By waiving those rights, she allows the government to preserve its prosecutorial and judicial resources, and she permits the prompt commencement of her rehabilitation. *See Brady*, 397 U.S. at 752. In return, the pleading defendant obtains benefits: perhaps a promise of lesser charges or a lesser sentence, and the speedy resolution of her case. *Id.* The result is a "mutuality of advantage" that affords both the government and a defendant outcomes superior to those possible in a plea-free system. *See id.*; *see also, e.g.*, Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1975 (1992).

The Constitution establishes a framework for the protection of this system, which has practical benefits for defendants and the government alike. The retroactive application of Section 1101(a)(13)(C)(v) to those who enter into plea agreements would be inconsistent with the constitutional safeguards protecting the plea bargaining process, and would undermine participants' confidence in the finality of pre-IIRIRA guilty pleas to the detriment of defendants and society alike.

A. The Retroactive Application Of Section 1101(a)(13)(C)(v) Would Be In Tension With The Constitutional Values Animating This Court's Plea Bargain Jurisprudence.

1. The Constitution imbues a criminal defendant's decision to plead guilty with constitutional protections and imperatives. To prevent pleas obtained by duress, fraud, and other deficiencies, for example, due process requires that any court receiving a guilty plea assure itself that the plea is both "intelligent"—*i.e.*, "knowing" and "done with sufficient awareness of the relevant circumstances and likely consequences"—and "voluntary." *Brady*, 397 U.S. at 748.[13] The Sixth Amendment supports this objective by requiring that the pleading defendant's counsel adequately inform her choice of whether to plead guilty. *Padilla*, 130 S. Ct. at 1482–83; *see also id.* at 1492–94 (Alito, J., concurring in the judgment) (arguing that affirmative mis-advice by counsel violates the Sixth Amendment and that in cases of affirmative mis-advice "it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional rights"); *Libretti v. United States*, 516 U.S. 29, 50 (1995) (". . . it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement"). And to protect agreements and facilitate bargaining, a defendant who enters into a

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[13] For the same reason, the defendant must be found competent to enter a plea of guilty. *See, e.g.*, *Godinez v. Moran*, 509 U.S. 389, 396 (1993).

plea agreement must honor promises made to the government, *see, e.g.*, *Ricketts v. Adamson*, 483 U.S. 1, 9–12 (1987), and the government must honor promises made in exchange for the guilty plea, *e.g.*, *Santobello*, 404 U.S. at 262–63.

Santobello well illustrates the point. In that case, the defendant pleaded guilty in reliance on the prosecutor's promise that the State would make no sentencing recommendation. 404 U.S. at 258. Before sentencing, however, the defendant's case was taken over by a new prosecutor, and the new prosecutor failed to honor his predecessor's promise. *Id.* at 259, 262. This Court held that the State's actions breached the defendant's plea agreement, even if the breach was "inadvertent," and that the defendant was accordingly entitled to a remedy. *Id.* at 262–63. The case was remanded to the lower court to determine the appropriate remedy: rescission of the agreement to plead guilty, or specific performance of the State's promise. *Id.* at 263.

For the defendant, the sum of these rules rationalizes the defendant's decisionmaking and guarantees the reasonable expectations underlying the choice of a plea. Motivating each rule is a concern with protecting that choice, either *ex ante* (when the choice is made) or *ex post* (when, in the future, the bargain inducing the choice is threatened). *Ex ante*, the rules ensure that the choice to plead is rational and informed—by preventing fraud and duress, for example. *See, e.g.*, *Santobello*, 404 U.S. at 261–62; *Machibroda v. United States*, 368 U.S. 487, 493 (1962) (holding that a plea is void "if induced by promises or threats which deprive it of the character of a voluntary act"); *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (per curiam) (plea void if coerced by the

threats of an FBI agent); *Walker v. Johnston*, 312 U.S. 275, 286 (1941) (plea void if defendant "was deceived or coerced by the prosecutor into entering a guilty plea"); *cf.* Restatement (Second) of Contracts § 164 (fraud); *id.* § 175 (duress). And *ex post*, the rules ensure that the pleading defendant receives the benefit of his bargain. *See, e.g.*, *Santobello*, 404 U.S. at 262 ("This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances.").

2. Retroactive application of 8 U.S.C. § 1101(a)(13)(C)(v) to pre-IIRIRIA guilty pleas would denigrate these constitutional values. It would deny lawful-permanent-resident defendants *ex post* protection of their reasonable expectations in agreeing to plead guilty. And it would permit the government to retain its benefit from the bargain while denying to the pleading defendants an important benefit.

Indeed, retroactively altering the core immigration consequences of pre-IIRIRA guilty pleas is little different than reneging on a charging or sentencing promise. *Cf., e.g.*, *Santobello*, 404 U.S. at 262 (holding that where a promise "can be said to be part of the inducement or consideration" for a plea, "such promise must be fulfilled"). Unlike many consequences of a conviction that may not be within the consciousness of defendants when they decide whether to plead guilty, the *Fleuti*-based right to return was an essential right that competent attorneys expressly considered and advised regarding pre-IIRIRA, and that many lawful permanent residents therefore considered when contemplating guilty pleas. *See supra* at 18–24. Had a lawful permanent

resident like petitioner known at the time of his plea that he would be forfeiting his statutory travel rights, he could have instructed his attorney to negotiate a non-moral-turpitude plea or, were that not an option, he could have chosen to contest his guilt at trial. Denying him this important benefit after the waiver of his constitutional rights vitiates the intelligence of this "choice." *See Camins*, 500 F.3d at 884; *Olatunji*, 387 F.3d at 397.

"A statute having such a [retroactive] result may incur the opposition of the Constitution." *Laramie*, 231 U.S. at 199–200; *see also Landgraf*, 511 U.S. at 281 ("Retroactive [application of the statute] would raise a serious constitutional question."). This Court need not, however, reach the difficult question whether the Due Process Clause forbids expressly altering the terms of plea bargains retroactively. Because the statute does not "explicit[ly] command" such an outcome, *Landgraf*, 511 U.S. at 281, the Court should follow a path that avoids the dual evils of presuming retroactivity and pushing the limits of due process. *See id.*; *Laramie*, 231 U.S. at 199–200 ("When such may be the result a different construction of the statute is determined.").

Denying retroactive application to 8 U.S.C. § 1101(a)(13)(C)(v), as it is interpreted by the government, ensures that lawful-permanent-resident defendants who pleaded guilty pre-IIRIRA, with the understanding that they would remain entitled to the brief foreign trips allowed under the Immigration and Nationality Act, are afforded the full benefit of their bargain. Holding otherwise would significantly weaken the long-standing constitutional structure that this Court has established for guilty pleas.

B. The Retroactive Application Of Section 1101(a)(13)(C)(v) Would Destabilize The Plea Process And Undermine The Finality Of Completed Plea Bargains.

Approximately ninety-five percent of all convictions are obtained through guilty pleas.[14] This system serves to conserve judicial, police, juror, and prosecutorial resources, hastens the resolution of pending matters, spares witnesses the trauma and inconvenience of testifying at trial, and dramatically lowers the cost to taxpayers of the criminal justice system. *See generally Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (praising the "virtues of the plea system—speed, economy, and finality"); *United States v. Timmreck*, 441 U.S. 780, 784 (1979) ("'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice.'") (quoting *United States v. Smith*, 440 F.2d 521, 528–29 (7th Cir. 1971) (Stevens, J., dissenting)); *see also United States v. Dominguez-Benitez*, 542 U.S. 74, 83 (2004) ("[guilty pleas] are indispensable in the operation of the modern criminal justice system"). The success of the system hinges on the confidence that

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[14] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Disposition of Criminal Cases Terminated, By Offense, During Oct. 1, 2007-Sept. 30, 2008* tbl. 4.2 (2010) (96% of federal convictions over the period studied—79,762 of 82,823—were by guilty plea); Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006 Statistical Tables* 25 tbl. 4.1 (Dec. 2009) (94% of felony convictions in state courts in 2006 were by guilty plea).

both prosecutors and defendants have in the bargain struck. If, however, "either party were able to secure its benefits while making its obligations contingent, the utility of plea agreements would disappear." *United States v. Morgan*, 406 F.3d 135, 137 (2d Cir. 2005). In particular, if defendants lack confidence in safeguards protecting against retroactive changes to the terms of the plea, more and more will be encouraged to choose trial instead. That result would be detrimental to defendants and to the public interest alike.

This Court has often expressed concern for destabilization of the plea process when it is the defendant who seeks to revisit the terms of a completed plea bargain. *See, e.g., Dominguez-Benitez*, 542 U.S. at 82 (noting "the particular importance of the finality of guilty pleas"); *United States v. Vonn*, 535 U.S. 55, 72 (2002) (same); *Bousley v. United States*, 523 U.S. 614, 621 (1998) ("We have strictly limited the circumstances under which a guilty plea may be attacked on collateral review."). This Court should be no less vigilant in safeguarding the finality of plea bargains when it is the government that seeks, years later, to change the consequences of those bargains.

CONCLUSION

The judgment of the United State Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX:

Amici Curiae

This Appendix provides more detailed descriptions of *amici* organizations.

The **National Association of Criminal Defense Lawyers** ("NACDL") is a non-profit corporation with more than 12,500 members nationwide, joined by 35,000 members of 90 affiliate organizations in all 50 states. Founded in 1958, NACDL promotes criminal law research, advances and disseminates knowledge in the area of criminal practice, and encourages integrity, independence, and expertise among criminal defense counsel. NACDL's members include criminal defense lawyers, U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The **National Legal Aid & Defender Association** ("NLADA"), founded in 1911, is this country's oldest and largest non-profit association of individual legal professionals and legal organizations devoted to ensuring the delivery of legal services to the poor. For one hundred years, NLADA has secured access to justice for people who cannot afford counsel through the creation and improvement of legal institutions, advocacy, training, and the development of nationally applicable standards. NLADA promotes the fair, transparent, efficient, and uniform administration of criminal justice, and serves as the collec-

tive voice for both civil legal services and public defense services throughout the nation.

The **Immigrant Defense Project** ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes, and therefore has a keen interest in ensuring that immigration laws relating to criminal case dispositions are correctly interpreted. IDP provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. This Court has accepted and relied on *amicus curiae* briefs submitted by IDP in key cases involving the proper application of federal immigration law to immigrants with past criminal adjudications, including *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (No. 09-60); *Lopez v. Gonzalez*, 549 U.S. 47 (2006) (No. 05-547); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (No. 03-583); *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767) (cited at *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001)).

The **Immigrant Legal Resource Center** ("ILRC") is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal adjudications.

The **National Immigration Project** ("NIP") **of the National Lawyers Guild** is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. NIP provides legal training to the bar and the bench on immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises published by Thomson-West. NIP has participated as *amicus curiae* in several significant immigration-related cases before this Court.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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IN THE

Supreme Court of the United States

PANAGIS VARTELAS,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE NATIONAL IMMIGRANT JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is 8 U.S.C. § 1101(a)(13)(C)(v), which has been interpreted as depriving certain lawful permanent residents of their right to take brief trips abroad without being denied reentry, impermissibly retroactive as applied to lawful permanent residents who pleaded guilty before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)?

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INTEREST OF THE *AMICUS CURIAE*

The National Immigrant Justice Center (NIJC) is a non-profit organization accredited by the Board of Immigration Appeals since 1980 to provide immigration assistance. NIJC provides legal education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence, victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In 2009, NIJC provided such legal services to more than 10,000 non-citizens.

NIJC also promotes respect for human rights and access to justice for immigrants, refugees, and asylum seekers through policy advocacy, impact litigation, and public education. In light of the foregoing mission, NIJC has a deep interest in ensuring that the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") is not applied retroactively in a manner that is inconsistent with Congressional intent and fundamental principles of fairness.

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this briefs preparation or submission. Counsel of record for both petitioner and respondents received timely notice of amicus's intent to file the brief, and consented to it.

INTRODUCTION AND SUMMARY OF ARGUMENT

Prior to 1997, the Immigration and Nationality Act ("INA") set out different standards governing "exclusion" and "deportation." An alien seeking "entry" into the United States could be "excluded" based on a broad set of grounds and with relatively minimal procedures. But an alien who had already "entered" the country could be "deported" only on narrower grounds and with greater procedural protections. *See, e.g.*, 8 U.S.C. §§ 1182(a), 1251(a) (1994); *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212-15 (1953).

In *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963), this Court held that a lawful permanent resident's "innocent, casual, and brief" trip outside the country was not sufficiently "disruptive of his resident alien status" that a return from such a trip could be considered an "entry" under the INA. *Id.* As a result, a lawful permanent resident ("LPR") who was not deportable while in the United States, but would have been excludable if seeking "entry" into the country, had the right to take "innocent, casual, and brief" trips abroad without triggering exclusion proceedings upon return.

Petitioner was such an alien. That is, he was an LPR with a minor conviction for conspiracy to make or possess a counterfeit security. Pet. App. 2-3. This single conviction did not render Petitioner deportable, 8 U.S.C. § 1251(a) (1994), but this conviction was for an excludable offense; *i.e.*, it would have made Petitioner excludable if he were seeking entry, as it was for a "crime involving moral

turpitude," 8 U.S.C. § 1182(a) (1994). Thus, prior to 1997, Petitioner's conviction did not prevent him from taking brief trips outside the United States.

With the passage of IIRIRA in 1997, Congress replaced the term "entry" with the term "admission" as the key to determining many aliens' legal status. Interpreting this new term, defined in INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v), the BIA concluded that "admission" was required for *any* physical entry into the country by an alien convicted of an excludable offense triggering inadmissibility under 8 U.S.C. § 1182(a)(2), even if the alien's trip abroad had been "innocent, casual, and brief." *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1065-66 (BIA 1998) (en banc). Under the BIA's interpretation, IIRIRA thus abrogated the *Fleuti* doctrine for all aliens convicted of an excludable offense.[2]

As a result, now if such aliens take an "innocent, casual, and brief" trip overseas, they must seek admission upon return. That not only places their legal resident status at risk, but also could result in their detention for a period of months, or even years. *See* 8 C.F.R. § 1003.19(h)(2)(i). And this is so for all aliens, regardless of whether they were convicted of excludable offenses before or after IIRIRA's effective date.

---

[2] *Amicus curiae* believes there are strong arguments that *Collado-Munoz* was wrongly decided. *See, e.g.*, *Collado-Munoz*, 21 I. & N. Dec. at 1075 (Rosenberg, Bd. Mem., dissenting) ("[T]he statute is utterly silent as to the continued vitality of the *Fleuti* doctrine."). Given the formulation of the Question Presented, however, *amicus curiae* will assume *arguendo* that IIRIRA abrogated the *Fleuti* doctrine.

This Court has long recognized that federal statutes will not be read to apply retroactively absent a clear expression of congressional intent to the contrary. This presumption is grounded in "[e]lementary considerations of fairness," which dictate that "'the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). In assessing whether a statute operates retroactively, the Court has generally asked "whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 270. Several members of the Court have suggested that an alternative formulation better explains the Court's precedents. Under that approach, a court should determine "the relevant activity that the [new] rule regulates"; "only such relevant activity which occurs *after* the effective date of the statute is covered." *Id.* at 291 (Scalia J., concurring).

IIRIRA's abrogation of the *Fleuti* doctrine would be impermissibly retroactive under either of the foregoing standards if applied to LPRs who, like petitioner, were convicted of an excludable offense before the enactment of IIRIRA. Limiting the ability of such LPRs to travel overseas would attach major "new legal consequences to events completed before [IIRIRA's] enactment." *Id.* at 270 (majority opinion). Moreover, because subsection 101(a)(13)(C)(v) constitutes an added penalty for certain crimes, "the relevant activity that the [new] rule regulates" is petitioner's conviction for an excludable offense, an "activity which occurs [before] the effective date of

the statute." *Id.* at 291 (Scalia J., concurring). Because it is undisputed that subsection 101(a)(13)(C)(v) does not expressly define its own temporal reach, the presumption against retroactivity dictates that subsection 101(a)(13)(C)(v) not be applied in this retroactive manner.

The Second Circuit reached a contrary conclusion by erroneously requiring a showing of specific, individualized reliance before finding a statute to have retroactive effect. This approach cannot be reconciled with the decisions of this Court, fundamentally misunderstands the role of reliance interests in applying the presumption against retroactivity, and would produce the untenable result of a single statute meaning as many things as there are people to whom it applies.

This Court should accordingly reject the Second Circuit's approach and instead hold that subsection 101(a)(13)(C)(v) does not apply to LPRs who, like Petitioner, were convicted of an excludable offense prior to the Act.

ARGUMENT

As this Court explained in *Landgraf*, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." 511 U.S. at 265. The presumption stems from a principle with "timeless and universal appeal": "'the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.'" *Id.* (quoting *Kaiser*, 494 U.S. at 855 (Scalia, J., concurring)). Indeed, this "antiretroactivity principle" is reflected in several provisions of the

Constitution, including the Ex Post Facto Clause, the Contracts Clause, and the Fifth Amendment's Due Process Clause. *Id.* at 266.

It is undisputed that IIRIRA's abrogation of the *Fleuti* doctrine is not explicitly retroactive. *See* Pet. App. 20-21 ("[H]ere, we note—and the government concedes—that Congress has not expressly prescribed the temporal reach of § 101(a)(13)."). Accordingly, the question in this case is simply whether abrogating the *Fleuti* doctrine for LPRs already convicted of an excludable offense before IIRIRA's effective date would constitute a retroactive change to their legal rights. *See Landgraf*, 511 U.S. at 280. Such a change would be impermissibly retroactive. The Second Circuit's contrary holding cannot be reconciled with either of the approaches suggested by this Court's case law or basic principles of statutory interpretation.

I. ABROGATION OF THE *FLEUTI* DOCTRINE WOULD BE IMPERMISSIBLY RETROACTIVE IF APPLIED TO LPRS CONVICTED OF AN EXCLUDABLE OFFENSE BEFORE IIRIRA'S EFFECTIVE DATE.

A. A Statute Applies Retroactively if it Attaches New Legal Consequences to Past Conduct or Regulates Past Activity.

Despite the well-established pedigree of the presumption against retroactivity, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. But the majority opinion in *Landgraf*, as well as a concurring opinion by Justice Scalia, offered several guideposts that

courts should consider in assessing the retroactive nature of a legal change.

1. The *Landgraf* majority.

When applying the presumption against retroactivity, the overarching inquiry is "whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 270. The *Landgraf* majority drew this principle from Justice Story's classic formulation:

> "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . ."

Id. at 269 (quoting *Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (No. 13,156) (CC NH 1814)).

Moreover, the Court added, "[t]he presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Id.* at 270. In applying the presumption, "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.*

Finally, the Court explained, new rules "conferring or ousting jurisdiction" over suits arising from prior conduct are often not considered retroactive because "[a]pplication of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case." *Id.* at 274 (internal quotation marks

omitted). By the same token, "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." *Id.* at 275. Although such rules may sometimes be considered retroactive, they generally do not pose the same retroactivity concerns because they "regulate secondary rather than primary conduct." *Id.*

Turning to the statute before it, the *Landgraf* majority easily concluded that the punitive damages remedy added to Title VII by the 1991 Civil Rights Act could not apply to pre-enactment conduct absent a clear statement of congressional intent. *Id.* at 281. That result was clear, the Court reasoned, because punitive damages "share key characteristics of criminal sanctions." *Id.*

The Court reached the same conclusion regarding the retroactivity of the new *compensatory* damages provision added to Title VII. *Id.* at 282. Because this new compensatory damages remedy "only reache[d] discriminatory conduct already prohibited by Title VII," the Court acknowledged, it "d[id] not make unlawful conduct that was lawful when it occurred." *Id.* at 281-82. "Nor could anyone seriously contend that the compensatory damages provisions smack of a 'retributive'" purpose. *Id.* at 282. Nonetheless, the Court concluded that the new compensatory remedy could not be applied to pre-enactment conduct absent a clear statement, for several reasons.

First, compensatory damages are "quintessentially backward looking."

Second, "[t]he introduction of a right to compensatory damages is also the type of legal

change that would have an impact on private parties' planning." *Id.* To be sure, the Court conceded, "concerns of unfair surprise and upsetting expectations [would be] attenuated in [many] case[s] of intentional employment discrimination, which has been unlawful for more than a generation." *Id.* at 282 n.35. But, the Court reasoned, "a degree of unfairness is inherent *whenever* the law imposes additional burdens based on conduct that occurred in the past." *Id.* (emphasis added).

Finally, even though the compensatory damages remedy could be seen as simply "increasing the amount of damages available under a preestablished cause of action," such a change would still raise retroactivity concerns because "[t]he *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." *Id.* at 283-84.

2. The *Landgraf* concurrence.

Justice Scalia agreed with the majority's conclusion regarding the retroactivity of the 1991 Civil Rights Act, but took a different path to rationalize that result and the Court's retroactivity precedents. He opined that, whether a statute "upset[] vested substantive rights" did not "ha[ve] anything to do with . . . the presumed temporal application of a statute." *Id.* at 291 (Scalia J., concurring) (internal quotation marks omitted). "The critical issue," Justice Scalia explained:

> is not whether the rule affects "vested rights," or governs substance or procedure, but rather what is the relevant activity that the rule regulates. Absent a clear statement otherwise,

> only such relevant activity which occurs *after* the effective date of the statute is covered.

Id. On this analysis, both the punitive and compensatory damages provisions were easily classified as retroactive because they were "directed at the regulation of primary conduct, and the occurrence of the primary conduct is the relevant event." *Id.* at 294.

As explained below, in this case, these guideposts all point to the same conclusion: IIRIRA's abrogation of the *Fleuti* doctrine for LPRs convicted of an excludable crime prior to IIRIRA is impermissibly retroactive.

B. If Applied to LPRs Already Convicted of an Excludable Offense, Abrogation of the *Fleuti* Doctrine Would Attach New Legal Consequences to Past Conduct.

Under the *Landgraf* majority's approach, the new burden imposed by subsection 101(a)(13)(C)(v) would plainly be retroactive if applied to LPRs such as Petitioner.

Prior to 1997, LPRs who had convictions making them excludable but not deportable had a legal right to take "innocent, casual, and brief" trips abroad without facing exclusion proceedings on their return. *Fleuti*, 374 U.S. at 462. If applied to such LPRs, IIRIRA's abrogation of the *Fleuti* doctrine would eliminate that right. Put another way, subsection 101(a)(13)(C)(v) would impose an additional restriction—the inability to travel abroad without risking one's lawful status—on such LPRs as a result of their criminal convictions. This clearly "would impair rights a party possessed when he acted" and

"attach[] new legal consequences" to past acts. *Id.* at 270, 280 (majority opinion). And, far from merely ousting jurisdiction or altering procedural rules, such a change destroys a deeply significant *substantive* right. *See id.* at 274-75.

Moreover, like the Title VII remedies analyzed in *Landgraf*, the denial of the right to travel overseas is certainly "the type of legal change that would have an impact on private parties' planning." *Id.* at 282. And while, "concerns of unfair surprise and upsetting expectations are attenuated" by the fact that the conduct triggering the new burden (commission of an excludable offense) was already unlawful, as the Court explained in *Landgraf*, new burdens attached to already-unlawful conduct still implicate retroactivity concerns since "a degree of unfairness is inherent *whenever* the law imposes additional burdens based on conduct that occurred in the past." *Id.* at 282 n.35 (emphasis added).

Indeed, concerns of fair notice and reliance are far stronger in this case than in *Landgraf*. Here, in practice, the burden at issue applies *only* to those LPRs who have already been convicted of an excludable offense. As Petitioner has explained, although subsection 101(a)(13)(C)(v) by its terms punishes the *commission* of an excludable offense, it applies in practice only to LPRs with *convictions* for such offenses. Pet. Br. 47. If "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is" at the time of potentially illegal conduct, *Landgraf*, 511 U.S. at 265, such principles are even more strongly implicated during a criminal prosecution, when alien defendants "are acutely aware of the

immigration consequences of their convictions." *INS v. St. Cyr*, 533 U.S. 289, 322 (2001). Indeed, the argument for applying subsection 101(a)(13)(C)(v) in this case is akin to arguing in *Landgraf* that companies who had *already paid* judgments or settlements for Title VII violations before the 1991 amendments could be subjected to *additional* compensatory damages after them. Such an imposition is plainly retroactive.

Finally, although deportation or exclusion "is not, in a strict sense, a criminal sanction," the Court has "long recognized that deportation is a particularly severe 'penalty,'" and is "intimately related to the criminal process." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)). Thus, like the punitive damages remedy in *Landgraf*—which this Court considered to be *clearly* retroactive—the new burden imposed on Petitioner by IIRIRA "share[s] key characteristics of criminal sanctions." *Landgraf*, 511 U.S. at 281.

Because IIRIRA's abrogation of the *Fleuti* doctrine would impose a major new burden on Petitioner based on his prior conviction, would do so in a manner that generally causes unfair surprise, and would "share[e] key characteristics of criminal sanctions," such a change must be considered retroactive.

C. The Relevant Activity Regulated by IIRIRA's Abrogation of the *Fleuti* Doctrine is an LPR's Conviction for an Excludable Offense.

Application of the standard set forth in Justice Scalia's concurrence only drives home the foregoing

conclusion. Subsection 101(a)(13)(C)(v) is triggered by an alien's conviction for an excludable offense. Accordingly, such an offense is the most obvious conduct regulated by the statute. That is, by revoking the right to travel abroad without risking lawful status, IIRIRA imposes an additional penalty for the commission of excludable offenses by LPRs.

No alternative activity or event is plausibly targeted by subsection 101(a)(13)(C)(v). An LPR's brief travel abroad could hardly be the target of the provision; it is simply implausible to suggest that Congress abrogated *Fleuti* to keep LPRs with excludable offenses *in* the United States. To whatever degree the law may regard LPRs with excludable offenses as undesirable, that undesirability stems from their underlying criminal convictions, *not* from the fact that they have taken an "innocent, casual, and brief" trip outside the country. *Fleuti*, 374 U.S. at 462.

Nor can it reasonably be thought that subsection 101(a)(13)(C)(v) regulates solely the *return* of an LPR after a brief trip abroad. If an LPR's return were the only relevant event, subsection 101(a)(13)(C)(v) would apply even to LPRs who left for a brief trip *before* IIRIRA and attempted to return *after*. But that would be impossible to reconcile with *Chew Heong v. United States*, 112 U.S. 536 (1884). There, the Court refused to apply the "Chinese Restriction Act," which barred Chinese laborers from reentering the United States without a certificate issued on their departure, to aliens who had left the country before the Act's passage and tried to return without a certificate after. *Id.* at 538-39. The Court reasoned that, at the time such aliens left the country, they

had a legal right to return without such a certificate. *Id.* at 559. To apply the new requirement to them would cause "rights previously vested [to be] injuriously affected," a result the Court would not reach "unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature." *Id.*

Read through the lens of Justice Scalia's *Landgraf* concurrence, *Chew Heong* reflects a recognition that Congress was, in fact, regulating more than Chinese laborers' initial entry. It was in fact placing a new restriction on aliens already in the country: a requirement that they obtain a certificate in order to leave and return. Here too, 101(a)(13)(C)(v) plainly does not restrict LPRs entry *qua* entry. Rather, on its face, the provision regulates only those LPRs who have committed an excludable offense. Indeed, even the Second Circuit conceded that "in framing § 101(a)(13)(C)(v) . . . Congress intended the focus to be on the alien's commission of the crime." Pet. App. 25.

Other portions of IIRIRA provide telling contrast: Under 8 U.S.C. § 1101(a)(13)(C)(iii) and (vi), for example, LPRs returning from brief trips abroad are treated as applicants for admission if they engaged in illegal activity during their trip or attempt to reenter illegally. Such provisions plainly target conduct related to the LPR's travel. Here, on the other hand, there is no plausible reason why Congress would have been concerned with brief trips overseas by LPRs such as Petitioner.

Chew Heong likewise exposes the flaw in the Government's argument that Petitioner's post-IIRIRA travel is the "determinative event for retroactivity analysis" and that Petitioner "could

have avoided the application of the statute. . . . [by] refrain[ing] from departing from the United States (or from returning to the United States)." BIO 12-13. The statute at issue in *Chew Heong* regulated a transaction that included some pre-enactment conduct (obtaining a certificate upon departure) and some post-enactment conduct (return to the United States). 112 U.S. at 538-39. Accordingly, the Chinese laborers in that case could have avoided application of the statute by "refrain[ing] from . . . returning to the United States." BIO 13. But this post-enactment Hobson's choice did not stop the Court from concluding that application of the Chinese Restriction Act would have been retroactive. *Id.* at 559. As the result in *Chew Heong* thus illustrates, the critical question in assessing the retroactivity of a statute must be whether the *primary* activity being regulated occurs prior to the statute's enactment.

Take, for example, a statute banning individuals convicted of sex offenses involving minors from residing within 2,000 feet of a school or child care facility. *See, e.g.*, *Doe v. Miller*, 405 F.3d 700, 704 (8th Cir. 2005). Such a statute would not be impermissibly retroactive as applied to a sex offender convicted prior to the law's passage, because "[t]he primary purpose of the law is not to alter the offender's incentive structure by demonstrating the negative consequences that will flow from committing a sex offense." *Id.* at 720. Rather, such a statute operates mainly prospectively "to reduce the likelihood of reoffense by limiting the offender's temptation and reducing the opportunity to commit a new crime." *Id.* In contrast, the post-enactment conduct at issue in this case (travel) is *not* the

primary target of subsection 101(a)(13)(C)(v). The pre-enactment criminal offense is.

Because "the relevant activity that [subsection 101(a)(13)(C)(v)] regulates" is the commission of an excludable offense "only such relevant activity which occurs *after* the effective date of the statute is covered." *Landgraf*, 511 U.S. at 291 (Scalia J., concurring).

II. THE SECOND CIRCUIT'S REQUIREMENT OF INDIVIDUAL RELIANCE CANNOT BE RECONCILED WITH *LANDGRAF* AND ITS PROGENY.

The Second Circuit followed none of these guideposts, but instead blazed its own trail. In so doing, the court did not quarrel with the notion that subsection 101(a)(13)(C)(v) imposed a new burden on Petitioner based on his pre-IIRIRA offense. Nor did the court dispute that Petitioner's offense was the relevant conduct regulated by subsection 101(a)(13)(C)(v). Rather, the Second Circuit grounded its decision on the assertion that Petitioner could not have *relied* on pre-IIRIRA law at the time he committed his offense.

Specifically, the Second Circuit reasoned that, because subsection 101(a)(13)(C)(v) is worded to refer to "the alien's *commission* of the crime," it would not consider the particularly weighty reliance interests at stake when an alien enters a plea bargain resulting in conviction. Pet. App. 25 (emphasis added). Instead, the court focused solely on the reliance interests implicated when Petitioner decided to *commit* his excludable offense: "it would border on the absurd to suggest that Vartelas committed his counterfeiting crime in reliance on the immigration

laws." Pet. App. 27. Because Petitioner had not actually and specifically relied on the availability of the *Fleuti* doctrine in committing his offense, the court concluded, applying subsection 101(a)(13)(C)(v), while perhaps retroactive, would not be "impermissibly" retroactive, regardless of whether he in fact was convicted through a plea bargain. Pet. App. 28.

That decision is consistent with a line of Second Circuit cases holding that the presumption against retroactivity will apply only where an alien demonstrates actual, subjective, and individual reliance on the prior state of the law. For example, in *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003), the court considered the retroactivity of IIRIRA's repeal of INA § 212(c), which had allowed certain aliens to receive of waiver of deportation. In *St. Cyr.*, this Court held that applying the repeal of § 212(c) to aliens who had previously pleaded guilty to a deportable offense would be retroactive because it "clearly 'attaches a new disability, in respect to transactions or considerations already past.'" 533 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 269). The Second Circuit distinguished this holding, however, because the aliens in *Rankine* had been convicted *at trial* and had not demonstrated individual reliance on the availability of § 212(c) relief:

> First, none of these petitioners detrimentally changed his position in reliance on continued eligibility for § 212(c) relief. Unlike aliens who entered pleas, the petitioners made no decision to abandon any rights and admit guilt . . . .

> Second, the petitioners have pointed to no conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) by going to trial. . . . . Under these circumstances, it is difficult to conclude, *as we must to find impermissible retroactivity*, that the petitioners chose to go to trial in reliance on the availability of § 212(c) relief.

Rankine, 319 F.3d at 99-100 (emphasis added). In sum, the Court reasoned, "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." *Id.* at 99; *see also Restrepo v. McElroy*, 369 F. 3d 627 (2d Cir. 2004) (suggesting that individual reliance could be shown where petitioner alleged that he had foregone an opportunity to file for relief under § 212(c) in subjective reliance on the ability to file later); *Carranza-De Salinas v. Gonzales*, 477 F.3d 200, 205 (5th Cir. 2007) (following *Rankine* and holding that "an applicant who alleges continued eligibility for § 212(c) relief [must] demonstrate *actual, subjective* reliance on the pre-IIRIRA state of the law to be eligible for relief from its retroactive application.") (emphasis added).

But this approach is irreconcilable with this Court's precedents, which do not require any showing of actual reliance by affected parties, let alone the sort of individualized reliance demanded by the Second Circuit. This approach, moreover, ignores that the presumption against retroactivity is a tool of statutory interpretation, which must produce a statute with a single meaning. The Court should expressly reject the Second Circuit's approach and clarify that "reliance" is simply a background

principle animating the presumption against retroactivity and is not a specific and individualized requirement of the doctrine.

A. A Statute's Retroactivity Does Not Require a Showing of Individualized Reliance.

This Court has repeatedly applied the presumption against retroactivity to bar the application of a statute without discussing individual reliance, and where the burdened party could not plausibly have relied on the prior state of the law. In *Landgraf* itself, for example, the Court conducted no individualized analysis of whether the employer, USI Film Products, actually relied on the absence of the punitive and compensatory damages added to Title VII by the newly-enacted law. *See Landgraf*, 511 U.S. at 280-93. Indeed, the Court effectively conceded that it was unlikely *any* employer could have relied on the absence of such damages, given that employment discrimination was already unlawful. *Id.* at 282 n.35 ("[C]oncerns of unfair surprise and upsetting expectations [would be] attenuated in [many] case[s] of intentional employment discrimination, which has been unlawful for more than a generation."). Nonetheless, the Court held that the principles animating the presumption against retroactivity were implicated because "a degree of unfairness is inherent *whenever* the law imposes additional burdens based on conduct that occurred in the past." *Id.* (emphasis added).

Likewise, in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), the Court considered the temporal scope of a 1986 amendment to the False Claims Act ("FCA"), which eliminated a defense to *qui tam* actions based on information

already in the Government's possession. The Court held that the elimination of this defense did not apply to pre-1986 conduct in light of the presumption against retroactivity. *Id.* at 941-42. As in *Landgraf*, however, the relevant conduct (submitting a false claim) had been unlawful for decades. *Id.* at 947. In fact, the elimination of the defense did not really change a party's potential liability *at all*, because the Government could bring the action with that information, and "the monetary liability faced by an FCA defendant is the same whether the action is brought by the Government or by a *qui tam* relator." *Id.* at 948. In such circumstances, it is difficult to see how any business could have detrimentally relied on the fact that inculpatory information was already in the Government's possession. Yet, again, the Court barred application of the new law on retroactivity grounds and did not even discuss reliance.

As the Third Circuit has summarized matters:, "it is unlikely that in *Landgraf* any employer demonstrably relied on the absence of a punitive damages remedy for Title VII violations, or that in *Hughes Aircraft* any government contractor purposely arranged its billing practices ex ante to take advantage of a specific defense under the False Claims Act." *Ponnapula v. Ashcroft*, 373 F.3d 480, 493 (3d Cir. 2004); *see also Olatunji v. Ashcroft*, 387 F.3d 383, 392 (4th Cir. 2004) (Luttig, J.) (noting that *Hughes Aircraft* applied the presumption against retroactivity "without even a single word of discussion as to whether *Hughes Aircraft*—or, for that matter, similarly situated government contractors—had relied on the eliminated defense to its detriment") (emphasis omitted). Indeed, "the Supreme Court has never required actual reliance in

any case in the *Landgraf* line." *Ponnapula*, 373 F.3d at 489.

These cases make clear that *Landgraf's* reference to "fair notice, reasonable reliance, and settled expectations," 511 U.S. at 270, can only be understood as describing the animating principles behind the presumption against retroactivity. This reference in no way defined the doctrine's outer limits. And it certainly did not require an *individualized* showing of reliance. As the Court made perfectly clear in *Hughes Aircraft*, "[t]o the extent respondent contends that *only* statutes with one of these effects are subject to our presumption against retroactivity, he simply misreads our opinion in *Landgraf*. . . . . [O]ur opinion in *Landgraf*, like that of Justice Story, merely described that any such effect constituted a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity." 520 U.S. at 947; *see also Olatunji*, 387 F.3d at 394 ("[T]he Supreme Court has *variously articulated* the requirements to show retroactivity, has never insisted upon a reliance requirement, and has consistently concluded that Justice Story's formulation is sufficient for invoking the presumption against retroactivity.") (emphasis in original).

The Second Circuit's requirement that reliance on prior law "must [be proved] to find impermissible retroactivity," *Rankine*, 319 F.3d at 100, is thus flatly inconsistent with the foregoing decisions.

B. The Second Circuit's Approach Would Impermissibly Tie the Meaning of a Statute to Individual Intent and Produce a Statute with No Unitary Meaning.

The Second Circuit's approach to retroactivity is also inconsistent with the basic premise that the presumption against retroactivity is a tool of statutory interpretation. Simply put, the temporal relationship between a statute and regulated conduct does not change based on the state of mind of a particular regulated party. *See Olatunji*, 387 F.3d at 394 ("Whether the particular petitioner did or did not subjectively rely upon the prior statute or scheme has nothing whatever to do with Congress' intent—the very basis for the presumption against statutory retroactivity."). Thus, there is no basis to presume, as the Second Circuit has, that Congress intended a single statute to apply retroactively to some aliens, who have relied on prior law, but not to other aliens, who also engaged in relevant conduct *at the same time*, but without reliance.

To the contrary, there is every reason to believe otherwise. For such a result would violate the well-established rule that a single statute cannot mean different things to different people. "To give the[] same words [in a statute] a different meaning for each category [or individual] would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005); *see also id.* (a statute may be interpreted in one of two ways "[i]t cannot, however, be interpreted to do both at the same time"); *id.* at 386 (applying a different statutory interpretation to different classes of people "would render every statute a chameleon" by "establish[ing] . . . the dangerous principle that judges can give the same statutory text different meanings in different cases").

But this is precisely the approach taken by the Second Circuit. Under *Rankine*, two aliens convicted on the same day for the same crime would be subject to different statutory rules. For the alien convicted at trial, IIRIRA would not operate retroactively and would have eliminated § 212(c) relief. But for the alien convicted by guilty plea, IIRIRA would operate retroactively and would not have eliminated § 212(c) relief. On the Second Circuit's view, "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." *Rankine*, 319 F.3d at 99.

Likewise, in *Restrepo*, the Second Circuit suggested that although an alien convicted at trial had not relied on the availability of § 212(c) when deciding to go to trial, he might have relied on the later availability of such relief by choosing not to file an earlier preemptive petition for § 212(c) relief. 369 F.3d at 632. The Court therefore held that, "on remand, the district court [would] have to make further inquiries in order to determine whether Petitioner may himself claim the benefit of his argument." *Id.* at 633. Thus, in *Restrepo*, the retroactive reach of IIRIRA turned on the subjective intent of an individual alien.

Such results are not consistent with an attempt to determine the temporal scope of a single statute. Instead, they appear to assume that the new statute applies, but then invent an atextual "reliance defense" to that application. As the Fifth Circuit has stated in applying the Second Circuit's test, "an applicant who alleges continued eligibility for § 212(c) relief [must] demonstrate actual, subjective reliance on the pre-IIRIRA state of the law *to be eligible for*

relief from its retroactive application." *Carranza-De Salinas*, 477 F.3d at 205 (emphasis added). But as Judge Luttig explained, the Court's case law:

> asks only whether a statute *in fact* has retroactive effect. . . . Whether the particular petitioner did or did not subjectively rely upon the prior statute or scheme has nothing whatever to do with Congress' intent—the very basis for the presumption against statutory retroactivity . . . . [W]here Congress has apparently given no thought to the question of retroactivity whatever, there is no basis for inferring that Congress' intent was any more nuanced than that statutes should not be held to apply retroactively.

Olatunji, 387 F.3d at 394. "Anything more, in the face of complete congressional silence, is nothing but judicial legislation." *Id.*

* * *

Under the multi-factor approach set out in *Landgraf*, actual reliance by some or all of the affected individuals or businesses would support a non-retroactive interpretation, but is by no means necessary. Moreover, even if some form of reliance were required to find a statute non-retroactive, it could not be a showing of individualized reliance. Rather, the most that could be reconciled with *Landgraf* and *Hughes Aircraft* is a requirement that the legal rule in question be the sort of rule on which an informed observer would rely; that is, the sort of rule that is objectively material. The *Fleuti* doctrine is precisely such a rule, as the ability to travel abroad without risking one's legal status is a deeply significant right for most aliens.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

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